DOCUMENT RESUME

ED 356 656 FL 021 157

TITLE	Voting Rights Act: Bilingual Education, Expert Witness Fees, and Presley. Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee to the Judiciary. House of Representatives, One Hundred Second Congress, Second Session (April 1, 2, and 8, 1992).
INSTITUTION	Congress of the U.S., Washington, D.C. House Committee on the Judiciary.
REPORT NO	ISBN-0-16-040639-0
PUB DATE	93
NOTE	699p.; Serial No. 93. Portions contain small print.
AVAILABLE FROM	U.S. Government Printing Office, Superintendent of Documents, Congressional Sales Office, Washington, DC 20402.
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF04/PC28 Plus Postage.
DESCRIPTORS	Alaska Natives; American Indians; Asian Americans; *Bilingual Education; *English (Second Language); *Federal Legislation; Hearings; Hispanic Americans; *Language Role; Policy Formation; *Public Policy; *Voting Rights
IDENTIFIERS	Congress 102nd; *Voting Rights Act 1965

ABSTRACT

Testimony concerning amendments to the Voting Rights Act of 1965 addresses, specifically, the provisions for language assistance for Alaskan native, Asian-American, Hispanic, and Native American citizens in order that they be able to exercise effectively their right to vote. The proposed legislation would extend coverage of Section 203 of the amendments for an additional 15 years. Testimony includes the transcribed and written statements, and supporting documentation, of: legislators (Solomon P. Ortiz, Jose E. Serrano, Patsy T. Mink, Bill Emerson, Henry J. Hyde) and scholars, attorneys, and representatives of voting rights, language, and educational organizations (John A. Garcia, Jeannette Wolfley, Kevin J. Lanigan, P. George Tryfiates, Faith Roessel, Margaret Fung, Josephine J. Wang, Philip Riggin, Andrew Hernandez, Yvonne Y. Lee, Luis C. Caban, Vanessa Dixon, Eugene W. Hickok, Jr., John R. Dunne, M. Faith Burton, Frank R. Parker, Abigail Thernstrom, Theodore M. Shaw, Joaquin G. Avila, and Timothy G. O'Rourke). Supporting materials submitted for the hearings are appended. (MSE)

****
*   Reproductions supplied by EDRS are the best that can be made   *
*   from the original document.   *
****

FL

VOTING RIGHTS ACT: BILINGUAL EDUCATION, EXPERT WITNESS FEES, AND PRESLEY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

APRIL 1, 2, AND 8, 1992

Serial No. 93

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it
☐ Minor changes have been made to improve reproduction quality
● Points of view or opinions stated in this document do not necessarily represent official OERI position or policy

Printed for the use of the Committee on the Judiciary

2

BEST COPY AVAILABLE

ED356656

FL 021 157

VOTING RIGHTS ACT: BILINGUAL EDUCATION, EXPERT WITNESS FEES, AND PRESLEY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

APRIL 1, 2, AND 8, 1992

Serial No. 93

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
61-387 CC WASHINGTON : 1993

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-040639-0

COMMITTEE ON THE JUDICIARY

JACK BROOKS, Texas, *Chairman*

DON EDWARDS, California
JOHN CONYERS, Jr., Michigan
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
MIKE SYNAR, Oklahoma
PATRICIA SCHROEDER, Colorado
DAN GLICKMAN, Kansas
BARNEY FRANK, Massachusetts
CHARLES E. SCHUMER, New York
EDWARD F. FEIGHAN, Ohio
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
HARLEY O. STAGGERS, Jr., West Virginia
JOHN BRYANT, Texas
MEL LEVINE, California
GEORGE E. SANGMEISTER, Illinois
CRAIG A. WASHINGTON, Texas
PETER HOAGLAND, Nebraska
MICHAEL J. KOPETSKI, Oregon
JACK REED, Rhode Island

HAMILTON FISH, Jr., New York
CARLOS J. MOORHEAD, California
HENRY J. HYDE, Illinois
F. JAMES SENSENBRENNER, Jr., Wisconsin
BILL McCOLLUM, Florida
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
CRAIG T. JAMES, Florida
TOM CAMPBELL, California
STEVEN SCHIFF, New Mexico
JIM RAMSTAD, Minnesota
GEORGE ALLEN, Virginia

JONATHAN R. YAROWSKY, *General Counsel*
ROBERT H. BRINK, *Deputy General Counsel*
ALAN F. COFFEY, Jr., *Minority Chief Counsel*

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

DON EDWARDS, California, *Chairman*

JOHN CONYERS, Jr., Michigan
PATRICIA SCHROEDER, Colorado
CRAIG A. WASHINGTON, Texas
MICHAEL J. KOPETSKI, Oregon

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
BILL McCOLLUM, Florida

CATHERINE LeROY, *Counsel*
IVY DAVIS-FOX, *Assistant Counsel*
JAMES X. DEMPSEY, *Assistant Counsel*
VIRGINIA SLOAN, *Assistant Counsel*
MELODY C. BARNES, *Assistant Counsel*
KATHRYN HAZEEM, *Minority Counsel*

CONTENTS

HEARINGS DATES

Page
April 1, 1992 1
April 2, 1992 309
April 8, 1992 373

OPENING STATEMENT

Edwards, Hon. Don, a Representative in Congress from the State of California, and chairman, Subcommittee on Civil and Constitutional Rights 1

WITNESSES

Avila, Joaquin G., voting rights attorney, Milpitas, CA 460
Caban, Luis C., associate executive director, Midwest-Northeast Voter Registration Education Project, Inc. 330
Dixon, Vanessa, government relations officer, U.S. ENGLISH, Inc. 344
Dunne, John, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, accompanied by Gerald Jones, Counsel 374
Emerson, Hon. Bill, a Representative in Congress from the State of Missouri 30
Fung, Margaret, executive director, Asian American Legal Defense and Education Fund 284
Garcia, John A., Ph.D., department of political science, University of Arizona 48
Hernandez, Andrew, president, Southwest Voter Registration Education Project 312
Hickok, Dr. Eugene W., Jr., department of political science, Dickinson College 349
Lanigan, Kevin J., Hogan & Hartson, attorney for the Mexican-American Legal Defense and Educational Fund, Inc. 107
Lee, Yvonne Y., national executive director, Chinese American Citizens Alliance 322
Mink, Hon. Patsy T., a Representative in Congress from the State of Hawaii 25
O'Rourke, Timothy G., Center for Public Service, University of Virginia, Charlottesville, VA 478
Ortiz, Hon. Solomon P., a Representative in Congress from the State of Texas 2
Parker, Frank, director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Washington, DC 403
Roessel, Faith, director, Navajo Nation Washington office 269
Serrano, Hon. Jose E., a Representative in Congress from the State of New York 7
Shaw, Theodore, professor, University of Michigan Law School 441
Thernstrom, Prof. Abigail, Boston University 427
Tryfiates, P. George, executive director, English First 246
Wang, Josephine J., teacher, Gaithersburg, MD 299
Wolfley, Jeanette, general counsel, Shoshone-Bannock Tribes, Fort Hall Indian Reservation 57

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARINGS

Avila, Joaquin G., voting rights attorney, Milpitas, CA: Prepared statement ... 464

Page
Caban, Luis C., associate executive director, Midwest-Northeast Voter Registration Education Project, Inc.: Prepared statement 333
Dixon, Vanessa, government relations officer, U.S. ENGLISH, Inc.: Addendum of testimony 346
Dunne, John, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice:
  Prepared statement 378
  Supplemental information regarding section 203 of the Voting Rights Act 397
Emerson, Hon. Bill, a Representative in Congress from the State of Missouri: Prepared statement 32
Fung, Margaret, executive director, Asian American Legal Defense and Education Fund: Prepared statement 286
Garcia, John A., Ph.D., department of political science, University of Arizona: Prepared statement 50
Hernandez, Andrew, president, Southwest Voter Registration Education Project: Prepared statement with attachments 317
Hickok, Dr. Eugene W., Jr., department of political science, Dickinson College: Prepared statement 353
Hyde, Hon. Henry J., a Representative in Congress from the State of Illinois:
  Letter to Hon. Henry J. Hyde, from Philip Riggin, Director, National Legislative Commission, the American Legion, dated March 27, 1992 310
  Prepared statement 34
Lanigan, Kevin J., Hogan & Hartson, attorney for the Mexican-American Legal Defense and Educational Fund, Inc.: Prepared statement 110
Lee, Yvonne Y., national executive director, Chinese American Citizens Alliance: Prepared statement 326
Mink, Hon. Patsy T., a Representative in Congress from the State of Hawaii: Prepared statement 27
O'Rourke, Timothy G., Center for Public Service, University of Virginia, Charlottesville, VA: Prepared statement 481
Ortiz, Hon. Solomon P., a Representative in Congress from the State of Texas: Prepared statement 3
Parker, Frank, director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Washington, DC:
  Exhibit of Lawyers' Committee expert witnesses expenses in voting rights cases which were disallowed following the Supreme Court's *West Virginiaa Hospitals* decision 410
  Newspaper editorial, "The Reach of the Voting Rights Act," the Washington Post, p. A22, February 12, 1992 406
  Newspaper editorial, "The Runaway Supreme Court," the New York Times, p. 16, February 2, 1992 407
  Prepared statement 412
Roessel, Faith, director, Navajo Nation Washington office: Prepared statement 272
Serrano, Hon. Jose E., a Representative in Congress from the State of New York: Prepared statement 10
Shaw, Theodore, professor, University of Michigan Law School: Prepared statement 444
Thernstrom, Prof. Abigail, Boston University: Prepared statement 429
Tryfiates, P. George, executive director, English First: Prepared statement 248
Wang, Josephine J., teacher, Gaithersburg, MD: Prepared statement 301
Wolfley, Jeanette, general counsel, Shoshone-Bannock Tribes, Fort Hall Indian Reservation: Prepared statement 59

APPENDIX

Letter from Leah Harjo Ware, president, Muscogee Nation Bar Association to Representative Don Edwards 497
Letter from Henry A. Ware, civil rights chairman, Oklahoma Indian Bar Association to Representative Don Edwards 498
Letter from Bill S. Fife, principal chief, Muscogee (Creek) Nation to Representative Don Edwards 500
Letter from Doris Beleele, vice president, IKWAI Foundation of Organized Resources in Cultural Equity to Representative Don Edwards 504
Letter from Shirley Brown, executor, International Native American Language Issues Nali Institute to Representative Henry J. Hyde 505

Page

Letter from Arthur A. Fletcher, Chairperson, U.S. Commission on Civil Rights to Representative Don Edwards 506
Letter from John R. Dunne, Assistant Attorney General, U.S. Department of Justice to Representative Don Edwards 508
Letter from Robert M. McGlotten, director, American Federation of Labor and Congress of Industrial Organizations 511
Statement from the Hon. Ileana Ros-Lehtinen 513
Statement from Ruben Franco, president and general counsel, Puerto Rican Legal Defense and Education Fund 514
Statement from the Leadership Conference on Civil Rights 521
Statement from Nydia Velazquez, secretary, Department of Puerto Rican Community Affairs in the United States 530
Statement from Susan S. Lederman, president, League of Women Voters of the United States 534
Statement from the Organization of Chinese Americans, Inc. 537
Statement from the National Asian Pacific American Legal Consortium 545
Statement from the Japanese American Citizens League 551
Statement from Esther Yazzie, official staff court interpreter, U.S. Courts for the Districts of New Mexico and Arizona 560
Statement from the Native American Rights Fund and the National Congress of American Indians 567
Statement from Marilyn Go, chair, National Asian Pacific American Bar Association 607
Statement from Wilma P. Mankiller, principal chief, Cherokee Nation of Oklahoma 610
Statement from Raul Yzaguirre, president, National Council of La Raza 615
Statement from Loius Nunez, president, National Puerto Rican Coalition, Inc. 624
Statement, submitted by Hon. John Conyers, Jr., a Representative in Congress from the State of Michigan 628
Report, submitted by Laughlin McDonald, American Civil Liberties Union 630
Statement, submitted by Dayna L. Cunningham, NAACP Legal Defense and Educational Fund, Inc. 663

VOTING RIGHTS ACT: BILINGUAL EDUCATION, EXPERT WITNESS FEES, AND PRESLEY

WEDNESDAY, APRIL 1, 1992

House of Representatives,
Subcommittee on Civil and Constitutional Rights,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:36 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Craig A. Washington, Michael J. Kopetski, Henry J. Hyde, and Howard Coble.

Also present: Melody Barnes, assistant counsel, and Kathryn Hazeem, minority counsel.

OPENING STATEMENT OF CHAIRMAN EDWARDS

Mr. Edwards. The subcommittee will come to order.

In 1975 and again in 1982, Congress amended the Voting Rights Act of 1965 to provide language assistance for Alaskan Native, Asian-American, Hispanic and native American citizens. Many of these citizens were from environments where English is not the dominant language. Because of the language barrier, many were unable to effectively exercise their right to vote. Thus, it was necessary for this body to enact and subsequently expand section 203 of the Voting Rights Act.

Unfortunately, many, but not all, of the problems that led to the enactment of section 203 still exist. Therefore, it is necessary for us to extend the coverage of section 203 for an additional 15 years. Also, we should make changes in section 203 to ensure that all citizens are able to exercise the franchise. Such changes should provide language assistance for jurisdictions in large language minority populations.

I hope that these hearings can afford us the opportunity to gather the information necessary to pass this greatly needed legislation.

We welcome the gentleman from Washington—the gentleman from Texas, Mr. Washington.

Mr. Washington. I'll accept "the gentleman from Washington, Mr. Texas."

[Laughter.]

Mr. Edwards. Do you have a statement, Mr. Washington?

Mr. Washington. I do not, Mr. Chairman.

Mr. Edwards. All right, well, then we'll proceed.

Well, we're honored to have our colleague, the Honorable Solomon Ortiz of Texas here. He represents the 27th District of Texas, and he's in his fifth term in Congress. He's a member of the Armed Services and Merchant Marine and Fisheries Committees as well as the Select Committee on Narcotics Abuse and Control. Mr. Ortiz is also chairman of the Congressional Hispanic Caucus.

We're delighted to have you here, Mr. Ortiz, and you may proceed.

STATEMENT OF HON. SOLOMON P. ORTIZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ORTIZ. Thank you, Mr. Chairman. I want to thank you for the opportunity to allow me to testify on the reauthorization of section 203 of the Voting Rights Act. I come before you today as chairman of the Congressional Hispanic Caucus in order to allow my colleagues the full opportunity to speak, I will keep my comments brief.

The Congressional Hispanic Caucus is committed to giving Americans, all Americans, including citizens whose first language is not English, the opportunity to fully participate in the electoral process. To fulfill that commitment, members of the Congressional Hispanic Caucus introduced H.R. 4312, the Voting Rights Improvement Act of 1992. H.R. 4312 would, in the judgment of the caucus, improve the effectiveness of section 203 by better ensuring that large Hispanic and other language minority communities receive bilingual voting assistance.

As you listen to today's testimony, I ask the subcommittee to keep in mind the purpose of the Voting Rights Act, to guarantee the right to vote. To abridge that right in any way would undermine the foundation of democracy.

For the specifics of H.R. 4312, I refer the subcommittee to Congressman Serrano, who introduced the bill on behalf of the caucus.

I thank you and, with your consent, I would like to submit a full written statement for the hearing record.

Mr. EDWARDS. Thank you. Without objection, all of the statements will be printed in full in the record.

Mr. ORTIZ. Thank you, Mr. Chairman.

[The prepared statement of Mr. Ortiz follows:]

Congress of the United States
Congressional Hispanic Caucus

557 Ford House Office Building Washington, D.C. 20515 (202) 226-3430 FAX (202) 225-7569

Solomon P. Ortiz (D-TX)
Chairman
Matthew G. Martinez (D-CA)
Vice Chairman
Ileana Ros-Lehtinen (R-FL)
Secretary-Treasurer

Edward R. Roybal
(D-CA)
E. (Kika) de la Garza
(D-TX)
Ron de Lugo
(D-VI)
Bill Richardson
(D-NM)
Esteban E. Torres
(D-CA)
Ben Blaz
(R-Guam)
Albert G. Bustamante
(D-TX)
Jaime B. Fuster
(D-PR)
Jose E. Serrano
(D-NY)
Ed Pastor
(D-AZ)

Margarita Roque
Executive Director

Statement of Congressman Solomon P. Ortiz
Before the House Judiciary Subcommittee on
Civil and Constitutional Rights
April 1, 1992

Mr. Chairman, thank you for the opportunity to testify on the reauthorization of Section 203 of the Voting Rights Act. I come before you today as Chairman of the Congressional Hispanic Caucus.

The Congressional Hispanic Caucus is committed to giving all Americans, including citizens whose first language is not English, the opportunity to fully participate in the electoral process.

To fulfill that commitment, Members of the Congressional Hispanic Caucus introduced HR 4312, the Voting Rights Improvement Act of 1992. HR 4312 would, in the judgement of the Caucus, improve the effectiveness of Section 203 by better ensuring that large Hispanic and other language minority communities receive bilingual voting assistance.

My remarks to the Subcommittee will address the following issues:

- Why should bilingual voting assistance be provided?
- What are the approximate costs of providing assistance?

Why should bilingual voting assistance be provided?

The right to vote is the foundation of democracy. The vote gives citizens access to the political process. Because it gives citizens the ability to elect responsive elected officials, the vote is the most powerful tool that an individual can use to influence the way our government is run.

This ability to bestow political power to an individual or community, more than anything else, should drive our belief in bilingual voting assistance. Bilingual voting assistance can make the difference in whether Hispanics and others participate in the political process. When put in this context, bilingual voting assistance can be seen not as a policy alternative, but rather as a moral imperative.

The number of voters requiring bilingual assistance is large and growing. According to Census data, the number of Spanish-speaking persons in the U.S. grew from 8.6 million in 1979 to 14.5 million in 1989, an increase of nearly two-thirds.

It has been suggested that bilingual assistance in voting, and in other arenas of American life, would inhibit the integration of this growing population into the mainstream of American culture. That argument is dead wrong.

Providing bilingual voting assistance is a way of encouraging citizens to participate in the most American of institutions -- the political process. By giving Hispanics a reason to believe in American government and by giving them a way to become invested in the decisions our government makes, bilingual voting assistance can cultivate a sense of pride and civic duty in Hispanics that is sorely needed in today's anti-government climate.

Hispanics know and understand this. Ninety-five percent of Hispanic immigrants stated that the most important reason for securing American citizenship was that it permits immigrants the right to vote, according to a survey conducted by the National Association of Latino Elected and Appointed Officials.

There might be less of a need for bilingual voting assistance by Hispanics if our schools successfully equipped Hispanic youth with a command of the English language. Receiving bilingual assistance should be a right. But if fewer Hispanics required bilingual assistance, the need to extend and revise Section 203 would be less urgent.

Unfortunately, American schools are failing the nation's Hispanic community. Hispanics have the highest drop-out rate of any major population group, with nearly one in two Hispanic students leaving schools before receiving their degree. Moreover, the demand for bilingual education continues to far outstrip the supply.

In short, if we keep in mind what the right to vote is all about, the provision of bilingual voting assistance seems as obvious, important, and productive as extending the franchise to women, African-Americans or eighteen-year olds.

What are the approximate costs of providing assistance?

Although it is difficult to pinpoint a precise price-tag for providing bilingual voting assistance, current cost estimates suggest that bilingual voting assistance is an inexpensive way to broaden political participation.

The best indication of the low cost of bilingual voting assistance is a 1984 report conducted by the General Accounting Office (GAO). According to the report, the total cost of providing written assistance averaged 7.6 percent, when calculated as a proportion of total election costs.

Oral language assistance was even less expensive. Two hundred five (205) of 259 reporting counties reported that they incurred no additional election costs as a result of providing oral language assistance. Thirty nine-other counties reported that oral language assistance averaged less than a thousand dollars per county.

State governments reported a similarly low cost for bilingual voting assistance. Such assistance added an average of less than $22,000 per state in a survey of ten states. For six of these states, these costs represented only two percent of total election costs.

The GAO report also anticipated that bilingual voting assistance costs would decrease over time as election materials were recycled and as officials gain more expertise in targeting assistance language minority communities.

Conclusion

My testimony has attempted to address only two issues in the debate on bilingual voting assistance: justification and cost.

In addition to reauthorizing Section 203, the Voting Rights Improvement Act of 1992 (HR 4312), introduced by the Congressional Hispanic Caucus, would also close some of the large gaps in Section 203 coverage. Several large Hispanic communities which should be receiving bilingual voting assistance by any rational standard remain uncovered by Section 203.

I refer the Subcommittee to Congressman Serrano, who introduced the bill on behalf of the Caucus, for the specifics of the legislation.

The underlying policy issues, however, are the same for both simple reauthorization and for including more communities under Section 203 coverage -- bilingual voting assistance is an

Statement of Congress Solomon P. Ortiz
on Bilingual Voting Assistance
Page 4

inexpensive way to extend the franchise.

I urge the Subcommittee to reauthorize Section 203 and to include the reforms suggested in HR 4312, the Voting Rights Improvement Act of 1992.

Thank you.

Mr. EDWARDS. May I introduce you also? We're so pleased to have you, Mr. Serrano.

Mr. Serrano is a member of the Education and Labor Committee and Small Business Committee. He represents the 18th District of New York. He's also, of course, a member of the Congressional Hispanic Caucus and is a cosponsor of H.R. 4312, the Voting Rights Improvement Act of 1992. We welcome you and you may proceed.

STATEMENT OF HON. JOSE E. SERRANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. SERRANO. Thank you. Thank you to Chairman Ortiz and thank you, Mr. Chairman.

Distinguished chairman and members of the subcommittee, thank you for the opportunity to present testimony on the reauthorization of section 203 of the Voting Rights Act of 1965 and to urge your favorable consideration on H.R. 4312, legislation which I and the caucus have sponsored.

I represent the 18th Congressional District in the State of New York. I was born an American citizen in Puerto Rico and came to the United States when I was 7 years old. My first language was Spanish. I learned English only after I arrived in the United States. I represent the South Bronx, a district widely believed to be the poorest in the Nation. My district is nearly 60 percent Latino in a county which is nearly 44 percent Latino.

The Voting Rights Act, and section 203 in particular, are largely responsible for the opportunity that I have been given to serve in the Congress of this, the greatest, the most free and democratic nation in the world. I am proud of my accomplishments and those of my community, of which I am a product.

With pride in my community comes a debt, to ensure that those who follow me are offered genuine opportunities to themselves achieve. It is service to this debt which guides my work in Congress and which has led me to sponsor this legislation to reauthorize section 203.

I start my testimony with a very personal appreciation of the need for, and the value of, the language assistance provisions of the Voting Rights Act. In 1985, while serving as an assemblyman in the New York State Legislature, I ran for the office of president of the Borough of the Bronx. I ran as a long shot. I nearly won. After impounding the voting machines and conducting several court-ordered recounts, officially I lost by less than 1 percent of the vote. Several weeks in advance of the election, it came to my attention that the board of elections of the city of New York had no plans to provide bilingual assistance to voters, in spite of the fact that language minority voters clearly exceeded 5 percent of the voting population. Not only was the board of elections hostile to the provision of bilingual services, some of its practices actually discouraged limited English-speaking voters from exercising their franchise.

I turned to section 203 of the Voting Rights Act to enforce the rights of Latino voters to participate effectively in the election and to elect the candidate of their choice. I, and the Latino voters who joined my suit, alleged that the acute shortage of trained Spanish-speaking election inspectors and interpreters, coupled with the dearth of bilingual voter information, conspired to disenfranchise thousands of New York City voters.

The litigation was settled by stipulation, pursuant to which the board of elections was required to conduct, under the supervision of the court, an aggressive voter education campaign in the Spanish language written press, radio, and television. In addition, the board of elections was required to prepare a list of polling places and election districts for which bilingual assistance was required and to recruit students and other bilingual people to serve as inspectors and interpreters throughout the borough.

As I stated, I did not win that election, but I came within 1 percentage point. More importantly, thousands of Latino voters were franchised for the first time. This, indeed, was a victory.

My testimony to you, then, comes from direct, deeply personal experience. Section 203 is not a luxury. It is the essence of the franchise for a large and growing number of voting American citizens. In addition, I and the caucus testify on behalf of over 25 groups on the Language Rights Task Force, representing national constituencies in the Asian, native American, Puerto Rican, and other Latino communities throughout the Nation.

Voting is the primary means by which citizens participate in the governance of their towns, counties, cities, States, and Nation. It is a fundamental right protected by the U.S. Constitution, a right which goes to the essence of our democracy. It is the voice through which citizens are heard on those concerns and interests relevant to their lives and the tool with which they ensure that people sensitive to their needs are elected to govern. It is a right guaranteed to all Americans, no matter their heritage, educational or economic background, and regardless of the language which they speak. The Voting Rights Act was adopted to rid this country of discrimination in voting and to safeguard for minorities an equal opportunity to participate in the political process and to elect representatives.

Section 203, Mr. Chairman, of the act is that tool by which the rights of limited English-proficient voters are preserved and the barriers to their equal, effective participation are removed. Citizens who are unable to effectively participate in an election because of the difficulty of language are denied the franchise, just as surely as they would be if literacy tests were administered or poll taxes levied. If bilingual election assistance is not guaranteed, a substantial number of U.S. citizens would be disenfranchised because they could not understand a ballot written only in English.

The effectiveness of the assistance provided pursuant to section 203 has been proven in the Hispanic, Asian-American, native American, and Alaskan Native communities, and the continuing need for language assistance in voting remains significant. Data reported by the Mexican-American Legal Defense and Educational Fund in a study substantiates that services provides under the provisions of 203 are widely and effectively employed by Latino voters. Those successes achieved under section 203 are real and measurable. The communities served by the provisions still face real obstacles to empowerment and full equal political participation in this society.

Language minority communities, the intended beneficiaries of section 203, have grown dramatically during the past decade. However, while these communities continue to enjoy significant growth, formidable barriers to full and equitable participation in the process still remains. As the National Council of La Raza reports in its February 1992 study, Latinos continue to suffer historic educational, economic, and health care disparities as compared with the general population. Experience over these last 10 years, Mr. Chairman, with section 203 confirms its effectiveness, but also reveals some inadequacies in the method by which jurisdictions are identified for coverage.

Relying exclusively on the 5-percent trigger deprives large limited English-proficient populations of the badly needed assistance. Significant jurisdictions, such as Los Angeles County, Cook County, Queens County, Philadelphia, and Essex Counties all have an estimated total of at least 300,000 limited English-proficient Latino voters who have been denied bilingual voting assistance because none of these counties meet the 5-percent standard. These counties are densely populated, major metropolitan areas in which it is virtually impossible for the Latino limited English-proficient voting populations to meet the 5-percent margin, even though those populations are numerically large.

Similarly, large Asian-American communities in Los Angeles, San Francisco, and three of New York City's counties—Kings, Queens, and New York or Brooklyn, Queens, and New York, Manhattan, as you know them—are currently not covered though they have significant language minority populations. Coverage of the native American community is also thwarted by an imprecise definition contained in section 203.

Section 203, in our opinion, should be amended to include an alternative standard of comparison that would allow the reservation, where appropriate, to be the basis of calculation of coverage for native American populations.

Mr. Chairman and members of the committee, we're a nation of many immigrants comprised of all races, nationalities, and religions. Immigrants speaking a variety of language toiled to make this country great. America was created by immigrants and continues to evolve with the contributions of new ones. Concerns about acculturation are often related to the question of whether new immigrants will learn English. Research shows that today's immigrants, like their predecessors—unfortunately, for me, but to state the fact—lose their mother tongues by the second or third generation. Far from threatening the primacy of English in America, it is precisely tools such as section 203 which facilitate the integration of immigrants into the diverse culture of this Nation. Bilingual elections do not promote cultural separatism, but instead help to integrate non-English speaking citizens into our system of democracy.

I thank you, Mr. Chairman, for putting up with half a voice that I have today, and I also thank you for the opportunity to speak before you.

Mr. EDWARDS. Well, thank you, Mr. Serrano. That is eloquent and effective testimony on behalf of the Congressional Hispanic Caucus, and we thank you also, Mr. Ortiz.

[The prepared statement of Mr. Serrano follows:]

TESTIMONY OF CONGRESSMAN JOSE SERRANO
BEFORE THE
HOUSE JUDICIARY SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
ON THE REAUTHORIZATION OF THE
LANGUAGE ASSISTANCE PROVISIONS
OF THE VOTING RIGHTS ACT

---

1 APRIL 1992

DISTINGUISHED CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, THANK YOU FOR THE OPPORTUNITY TO PRESENT TESTIMONY ON THE REAUTHORIZATION OF SECTION 203 OF THE VOTING RIGHTS ACT OF 1965 AND TO URGE YOUR FAVORABLE CONSIDERATION OF H.R. 4312, LEGISLATION I HAVE SPONSORED.

I REPRESENT THE 18TH CONGRESSIONAL DISTRICT IN THE STATE OF NEW YORK. I WAS BORN AN AMERICAN CITIZEN, IN PUERTO RICO AND CAME TO THE UNITED STATES WHEN I WAS SEVEN YEARS OLD. MY FIRST LANGUAGE WAS SPANISH; I LEARNED ENGLISH ONLY AFTER I ARRIVED IN THE UNITED STATES.

I REPRESENT THE SOUTH BRONX, A DISTRICT WIDELY BELIEVED TO BE THE POOREST IN THE NATION. MY DISTRICT IS NEARLY 60% LATINO, IN A COUNTY WHICH IS NEARLY 44% LATINO.

THE VOTING RIGHTS ACT, AND SECTION 203 IN PARTICULAR, ARE LARGELY RESPONSIBLE FOR THE OPPORTUNITY I HAVE BEEN GIVEN TO SERVE IN THE CONGRESS OF THIS, THE GREATEST, THE MOST FREE AND

DEMOCRATIC NATION IN THE WORLD. I AM PROUD OF MY ACCOMPLISHMENTS AND THOSE OF THE COMMUNITY OF WHICH I AM A PRODUCT. WITH PRIDE IN MY COMMUNITY COMES A DEBT, TO ENSURE THAT THOSE WHO FOLLOW ME ARE OFFERED GENUINE OPPORTUNITIES TO THEMSELVES ACHIEVE. IT IS SERVICE TO THIS DEBT WHICH GUIDES MY WORK IN CONGRESS, AND WHICH HAS LED ME TO SPONSOR THIS LEGISLATION TO REAUTHORIZE SECTION 203.

I START MY TESTIMONY WITH A VERY PERSONAL APPRECIATION OF THE NEED FOR AND THE VALUE OF THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT. IN 1985, WHILE SERVING AS AN ASSEMBLYMAN IN THE NEW YORK STATE LEGISLATURE, I RAN FOR THE OFFICE OF PRESIDENT OF THE BOROUGH OF

THE BRONX.

I RAN AS A LONG-SHOT. I NEARLY WON; AFTER IMPOUNDING THE VOTING MACHINES AND CONDUCTING SEVERAL COURT-ORDERED RE-COUNTS, OFFICIALLY I LOST BY LESS THAN ONE PERCENT OF THE VOTE.

SEVERAL WEEKS IN ADVANCE OF THE ELECTION, IT CAME TO MY ATTENTION THAT THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK HAD NO PLANS TO PROVIDE BILINGUAL ASSISTANCE TO VOTERS, IN SPITE OF THE FACT THAT LANGUAGE-MINORITY VOTERS CLEARLY EXCEEDED 5% OF THE VOTING POPULATION. NOT ONLY WAS THE BOARD OF ELECTIONS HOSTILE TO THE PROVISION OF BILINGUAL SERVICES, SOME OF ITS PRACTICES ACTUALLY DISCOURAGED LIMITED ENGLISH SPEAKING VOTERS FROM EXERCISING THEIR

FRANCHISE.

I TURNED TO SECTION 203 OF THE VOTING RIGHTS ACT, TO ENFORCE THE RIGHTS OF LATINO VOTERS TO PARTICIPATE EFFECTIVELY IN THE ELECTION, AND TO ELECT THE CANDIDATE OF THEIR CHOICE. I, AND THE LATINO VOTERS WHO JOINED MY SUIT, ALLEGED THAT THE ACUTE SHORTAGE OF TRAINED SPANISH-SPEAKING ELECTION INSPECTORS AND INTERPRETERS, COUPLED WITH THE DEARTH OF BILINGUAL VOTER INFORMATION CONSPIRED TO DISENFRANCHISE THOUSANDS OF NEW YORK CITY VOTERS.

THE LITIGATION WAS SETTLED BY STIPULATION, PURSUANT TO WHICH THE BOARD OF ELECTIONS WAS REQUIRED TO CONDUCT, UNDER THE SUPERVISION OF THE COURT, AN AGGRESSIVE VOTER EDUCATION[5] CAMPAIGN IN

THE SPANISH LANGUAGE WRITTEN PRESS, RADIO AND TELEVISION. IN ADDITION, THE BOARD OF ELECTIONS WAS REQUIRED TO PREPARE A LIST OF POLLING PLACES AND ELECTION DISTRICTS FOR WHICH BILINGUAL ASSISTANCE WAS REQUIRED, AND TO RECRUIT STUDENTS AND OTHER BILINGUAL PEOPLE TO SERVE AS INSPECTORS AND INTERPRETERS THROUGHOUT THE BOROUGH.

AS I STATED, I DID NOT WIN THAT ELECTION, BUT I CAME WITHIN ONE PERCENTAGE POINT OF VICTORY. MORE IMPORTANTLY, THOUSANDS OF LATINO VOTERS WERE ENFRANCHISED, FOR THE FIRST TIME. THIS, INDEED, WAS A VICTORY.

MY TESTIMONY TO YOU, THEN, COMES FROM DIRECT, DEEPLY PERSONAL EXPERIENCE.

SECTION 203 IS NOT A LUXURY. IT IS THE ESSENCE OF THE FRANCHISE FOR A LARGE AND GROWING NUMBER OF VOTING, AMERICAN CITIZENS.

IN ADDITION, I TESTIFY ON BEHALF OF OVER 25 GROUPS IN THE LANGUAGE RIGHTS TASK FORCE, REPRESENTING NATIONAL CONSTITUENCIES IN THE ASIAN, NATIVE AMERICAN, PUERTO RICAN AND OTHER LATINO COMMUNITIES.

VOTING IS THE PRIMARY MEANS BY WHICH CITIZENS PARTICIPATE IN THE GOVERNANCE OF THEIR TOWNS, COUNTIES, CITIES, STATES AND NATION. IT IS A FUNDAMENTAL RIGHT PROTECTED BY THE UNITED STATES CONSTITUTION, A RIGHT WHICH GOES TO THE ESSENCE OF OUR DEMOCRACY. IT IS THE VOICE THROUGH WHICH CITIZENS ARE HEARD ON

THOSE CONCERNS AND INTERESTS RELEVANT TO THEIR LIVES AND THE TOOL WITH WHICH THEY ENSURE THAT PEOPLE SENSITIVE TO THEIR NEEDS ARE ELECTED TO GOVERN. IT IS A RIGHT GUARANTEED TO ALL AMERICANS, NO MATTER THEIR HERITAGE, EDUCATIONAL OR ECONOMIC BACKGROUND AND REGARDLESS OF THE LANGUAGE WHICH THEY SPEAK.

THE VOTING RIGHTS ACT WAS ADOPTED TO RID THIS COUNTRY OF DISCRIMINATION IN VOTING AND TO SAFEGUARD FOR MINORITIES AN EQUAL OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES. SECTION 203 OF THE ACT IS THAT TOOL BY WHICH THE RIGHTS OF LIMITED ENGLISH PROFICIENT VOTERS ARE PRESERVED AND THE BARRIERS TO THEIR EQUAL, EFFECTIVE PARTICIPATION ARE REMOVED. CITIZENS WHO ARE UNABLE TO

EFFECTIVELY PARTICIPATE IN AN ELECTION BECAUSE OF THE DIFFICULTY OF LANGUAGE ARE DENIED THE FRANCHISE, JUST AS SURELY AS THEY WOULD BE IF LITERACY TESTS WERE ADMINISTERED OR POLL TAXES LEVIED.

IF BILINGUAL ELECTION ASSISTANCE IS NOT GUARANTEED, A SUBSTANTIAL NUMBER OF UNITED STATES CITIZENS WOULD BE DISENFRANCHISED BECAUSE THEY COULD NOT UNDERSTAND A BALLOT WRITTEN ONLY IN ENGLISH.

THE EFFECTIVENESS OF THE ASSISTANCE PROVIDED PURSUANT TO SECTION 203 HAS BEEN PROVEN IN THE HISPANIC, ASIAN AMERICAN, NATIVE AMERICAN AND ALASKAN NATIVE COMMUNITIES, AND THE CONTINUING NEED FOR LANGUAGE ASSISTANCE IN VOTING REMAINS

SIGNIFICANT.

DATA REPORTED BY THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN A STUDY SUBSTANTIATES THAT SERVICES PROVIDED UNDER THE PROVISIONS OF SECTION 203 ARE WIDELY AND EFFECTIVELY EMPLOYED BY LATINO VOTERS.

THOUGH SUCCESSES ACHIEVED UNDER SECTION 203 ARE REAL AND MEASURABLE, THE COMMUNITIES SERVED BY THE PROVISIONS STILL FACE REAL OBSTACLES TO EMPOWERMENT AND FULL AND EQUAL POLITICAL PARTICIPATION IN OUR SOCIETY. LANGUAGE MINORITY COMMUNITIES, THE INTENDED BENEFICIARIES OF SECTION 203, HAVE GROWN DRAMATICALLY DURING THE PAST DECADE. HOWEVER, WHILE THESE COMMUNITIES CONTINUE TO ENJOY SIGNIFICANT GROWTH, FORMIDABLE

BARRIERS TO FULL AND EQUITABLE PARTICIPATION IN THE POLITICAL/ELECTORAL PROCESS REMAIN. AS THE NATIONAL COUNCIL OF LA RAZA REPORTS IN ITS FEBRUARY 1992 STUDY, LATINOS CONTINUE TO SUFFER STARK EDUCATIONAL, ECONOMIC, AND HEALTH CARE DISPARITIES AS COMPARED WITH THE GENERAL POPULATION.

EXPERIENCE OVER THESE LAST 10 YEARS WITH SECTION 203 PROVISIONS CONFIRMS ITS EFFECTIVENESS, BUT ALSO REVEALS SOME INADEQUACIES IN THE METHOD BY WHICH JURISDICTIONS ARE IDENTIFIED FOR COVERAGE. RELYING EXCLUSIVELY ON THE FIVE PERCENT TRIGGER DEPRIVES LARGE LIMITED ENGLISH PROFICIENT POPULATIONS OF BADLY NEEDED ASSISTANCE.

SIGNIFICANT JURISDICTIONS SUCH AS

LOS ANGELES COUNTY, COOK COUNTY, QUEENS COUNTY, PHILADELPHIA AND ESSEX COUNTY, ALL HAVE AN ESTIMATED TOTAL OF AT LEAST 300,000 LIMITED ENGLISH PROFICIENT LATINO VOTERS WHO HAVE BEEN DENIED BILINGUAL VOTING ASSISTANCE BECAUSE NONE OF THESE COUNTIES MEET THE FIVE PERCENT STANDARD. THESE COUNTIES ARE DENSELY POPULATED MAJOR METROPOLITAN AREAS IN WHICH IT IS VIRTUALLY IMPOSSIBLE FOR THE LATINO LIMITED ENGLISH PROFICIENT VOTING POPULATIONS TO MEET THE FIVE PERCENT MARGIN EVEN THOUGH THOSE POPULATIONS ARE NUMERICALLY LARGE.

SIMILARLY, LARGE ASIAN AMERICAN COMMUNITIES IN LOS ANGELES, SAN FRANCISCO AND THREE NEW YORK CITY COUNTIES (KINGS, QUEENS AND NEW YORK) ARE CURRENTLY NOT

COVERED THOUGH THEY HAVE SIGNIFICANT LANGUAGE MINORITY POPULATIONS.

COVERAGE OF THE NATIVE AMERICAN COMMUNITIES IS ALSO THWARTED BY AN IMPRECISE DEFINITION CONTAINED IN SECTION 203.

SECTION 203 SHOULD BE AMENDED TO INCLUDE AN ALTERNATIVE STANDARD OF COMPARISON THAT WOULD ALLOW THE RESERVATION, WHERE APPROPRIATE, TO BE THE BASIS OF CALCULATION FOR COVERAGE FOR NATIVE AMERICAN POPULATIONS.

WE ARE A NATION OF MANY IMMIGRANTS, COMPRISED OF ALL RACES, NATIONALITIES AND RELIGIONS. IMMIGRANTS SPEAKING A VARIETY OF LANGUAGES TOILED TO MAKE THIS COUNTRY GREAT. AMERICA WAS CREATED BY

IMMIGRANTS, AND CONTINUES TO EVOLVE WITH THE CONTRIBUTIONS OF NEW IMMIGRANTS.

CONCERNS ABOUT ACCULTURATION ARE OFTEN RELATED TO THE QUESTION OF WHETHER NEW IMMIGRANTS WILL LEARN ENGLISH. RESEARCH SHOWS THAT TODAY'S IMMIGRANTS, LIKE THEIR PREDECESSORS, OVERWHELMINGLY LOSE THEIR MOTHER TONGUES BY THE SECOND OR THIRD GENERATION.

FAR FROM THREATENING THE PRIMACY OF ENGLISH IN AMERICA, IT IS PRECISELY TOOLS SUCH AS SECTION 203 WHICH FACILITATE THE INTEGRATION OF IMMIGRANTS INTO THE DIVERSE CULTURE OF THIS NATION. BILINGUAL ELECTIONS DO NOT PROMOTE CULTURAL SEPARATISM, BUT INSTEAD HELP TO INTEGRATE NON-ENGLISH SPEAKING CITIZENS INTO OUR SYSTEM OF DEMOCRACY.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THIS TESTIMONY TO YOU TODAY.

Mr. **EDWARDS**. The next witness is Congresswoman Patsy Mink. Congresswoman Mink represents the Second District of Hawaii and is a senior member of the Education and Labor and the Government Operations Committees. Ms. Mink first came to Congress just a short time after I did—was it 1964?

Ms. **MINK**. Right.

Mr. **EDWARDS** [continuing]. And was a hard-hitting and effective Member until a few years later she took a run at the Senate and was narrowly defeated by the late, great Hawaiian, Sparky Matsunaga. We're very glad to have you back, Patsy, and you may proceed.

STATEMENT OF HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Ms. **MINK**. Thank you very much, Mr. Chairman. I'm delighted to have this opportunity to appear here this morning in support of H.R. 4312, the Voting Rights Improvement Act, and ask unanimous consent that my entire statement be inserted in the record.

Mr. **EDWARDS**. Without objection.

Ms. **MINK**. I'll try to summarize my comments here.

I want to applaud the ingenuity and great contributions of my two colleagues, Mr. Serrano and Mr. Ortiz, for presenting this bill. It will make an enormous difference in the Asian constituency that I'm here attempting to represent this morning, as direct beneficiaries of this bill, should it be enacted. I hope that it will be.

I don't think I have to tell this committee the importance of the right to vote and the essential activity that it represents in enabling people to be direct participants in our democratic process. Without the opportunity to vote, we will be depriving these individuals of that aspect of citizenship which is coveted worldwide.

Our Nation, as we all know, is strong because of its diversity, and its diversity has to be represented also in the ballot box. What this bill attempts to do is to enlarge those protections which were originally put in the voting rights bill and to extend that requirement of enlarging the opportunity is what H.R. 4312 is attempting to do.

One might argue that going to vote is a simple matter and that the most rudimentary understanding of the English language is all that is required. I think that those of us who come from language minority communities understand what an intimidating process it is to go to vote. Almost to the day that my mother died—and she was born in Hawaii, spoke English fluently, and understood exactly what the process entailed—she still felt intimidated by the voting process that came once in 2 years. And so we had to review the ballot, simple things that one might assume need not be explained, like vote for no more than two, what does that mean, are the things in the ballot process that contribute to the confusion and perhaps to the reluctance of many language minority individuals to going to the polls and exercising this privilege that our process allows them.

So it seems to me that what Congressman Serrano is offering, not only the extension of section 203, but also clarification and extension of this bilingual aspect of the ballot process which is so essential. The 5-percent requirement that was placed into the original Voting Rights Act is laudatory, but we are here to testify that that 5 percent is not adequate, in very many communities, particularly as affecting Asian-Americans, for which I am here today to explore with this committee that 5 percent is much too large a percentage, and, therefore, the opportunity for bilingual assistance is denied thousands, tens of thousands, of Asian-Americans across this country. So we are here to ask you to consider this bill, in particular because of the extension of that requirement to a benchmark of 10,000 individuals in any county rather than the 5-percent benchmark which is now included in the current law.

Asian-Americans are an extremely fast-growing minority. We have the extension of immigration laws which have enabled them to enter the country, and they need specifically this kind of assistance in order to be full participants as they become new citizens in this country.

My State has benefited from the 5-percent benchmark. We have three counties in my State that are covered by current law. The extension to the requirement of 10,000 would be extremely beneficial. It would help Asian-Americans in States like California, New York, Texas, and Illinois, as my colleague has testified.

So I hope that you will approve this bill, enable the Congress to again explicitly acknowledge the importance of diversity in our country, and together with the expression of that importance, allow all of our citizens their right to participate in the electoral process. Thank you very much.

Mr. EDWARDS. Thank you very much, Mrs. Mink.

[The prepared statement of Ms. Mink follows:]

PATSY T. MINK
SECOND DISTRICT HAWAII

WASHINGTON OFFICE
2135 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON DC 20515-1102
(202) 225-4906
FAX (202) 225-4987

DISTRICT OFFICE
5104 PRINCE KUHIO FEDERAL BUILDING
P.O. BOX 50124
HONOLULU HAWAII 96850-4977
(808) 541-1986
FAX (808) 538-0233

Congress of the United States
House of Representatives
Washington, DC 20515-1102

COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEES
ELEMENTARY, SECONDARY & VOCATIONAL EDUCATION
POSTSECONDARY EDUCATION
LABOR MANAGEMENT RELATIONS

COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEES
HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS
GOVERNMENT INFORMATION, JUSTICE AND AGRICULTURE

STATEMENT BY U.S. REPRESENTATIVE PATSY T. MINK
BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
HOUSE COMMITTEE ON THE JUDICIARY
H.R. 4312, THE VOTING RIGHTS IMPROVEMENT ACT
APRIL 1, 1992

Mr. Chairman, thank you for this opportunity to appear today in support of H.R. 4312, the Voting Rights Improvement Act. Mr. Serrano and Mr. Ortiz have done a tremendous job in developing this legislation and I am pleased to testify in strong support of their bill.

The right to vote and to participate in our political process is the most precious right we have as citizens. The Voting Rights Improvement Act helps to ensure that all citizens, no matter what their native language, are able to exercise this right.

The strength of our nation has always been its diverse population and the ability of each person to express his or her own opinion through the electoral process. However, for language minorities exercising their Constitutional right to vote is often not an easy task. With uncertainty about the voting process and the instructions on the ballot, voting becomes an intimidating process for many language minorities.

In 1975 the Congress recognized the difficulties and barriers language minorities face in the electoral process and passed legislation to protect the right to vote for those citizens who do not have a proficient command of the English language.

The addition of Section 203 to the Voting Rights Act in 1975, requires certain counties to provide language assistance in voting if more than 5 percent of the voting age citizens were members of a language minority, the illiteracy rate of that group is higher than the national illiteracy rate, and there is a lack of English language proficiency within the relevant language minority group as determined by the Census Bureau.

H.R. 4812, the Voting Rights Improvement Act, continues the commitment of the Congress to protect the right to vote for language minorities by reauthorizing Section 203 for 15 years to bring it into the same reauthorization cycle as other provisions of the Act.

PRINTED ON RECYCLED PAPER

The bill also makes an important change to Section 208 which will help to expand the current requirement for language assistance to urban communities and other areas with a high percentage of language minorities that are not currently covered under the Act.

Under current law, language assistance is required only if the eligible voting population of the language minority totals 5 percent of the population of the entire county. This 5 percent requirement has excluded certain communities which have a high number of language minorities yet when counted along with the entire county do not meet the 5 percent benchmark.

To address this problem, H.R. 4812 requires communities which meet either the 5 percent benchmark or have at least 10,000 individuals who require assistance in the same language to provide voting assistance.

This more accurate method of targeting language minority voting populations will result in significant increases in language assistance for Asian American communities, which have had difficulty in meeting the 5 percent benchmark.

Asian Americans are currently the fastest growing minority group in the country. The 1990 census revealed that the percentage of Asian Americans increased 107 percent over the last 10 years. And over half of this growth was due to immigration, producing many new citizens that are not yet proficient in English. It is estimated that close to 43 percent of the adult Limited English Proficient population in California, New York, Hawaii, and Illinois are Asian language minorities.

However, very few jurisdictions meet the 5 percent benchmark and are required to provide Asian language assistance under Section 203. Currently only 3 counties in the nation, all of which happen to be in my district, provide language assistance.

It is important to remember that in order to qualify for Section 203 assistance, each specific Asian language, Japanese, Korean, Chinese or Tagalog, must reach the 5 percent benchmark.

Even states like California, New York, Texas and Illinois, which comprise 57 percent of the total mainland Asian American population, cannot meet that 5 percent threshold for Asian language assistance.

Mr. Chairman, the Voting Rights Improvement Act will provide Asian Americans with the assistance they need to be full fledged participants in our democracy.

H.R. 4812 will also do this for Native Americans. Currently many Indian Reservations cross county lines so the number of Native Americans who need language assistance in each county does not meet the 5 percent requirement. Yet the total percentage of individuals who need assistance within one reservation would meets this requirement. The bill allows the population of Indian Reservations to be used as the basis for eligibility for Section 203 assistance.

Mr. Chairman, H.R. 4812 is essential in preserving the rights guaranteed to all citizens in the Fourteenth and Fifteenth Amendments to the Constitution. We cannot deny language minorities the assistance needed to fulfill their duty as citizens of this nation because of a statistical benchmark.

Newcomers to our nation, as well as many language minorities who have resided in the United States for generations must be guaranteed the right to participate in our political system, to cast a independent and informed vote, and chose who will represent them in local governments, here in the Congress and in the highest office of the land. The enactment of Voting Rights Improvement Act is essential to preserve this right for every American.

Mr. **EDWARDS**. The last Member of Congress to testify is the Honorable Bill Emerson, who represents the 18th District of Missouri. He is a senior member of the Committees on Agriculture, Public Works and Transportation, and the Select Committee on Hunger. He has been a friend of all of us for many years, and we welcome you, Mr. Emerson. You may proceed. Without objection, your statement will be made a part of the record.

STATEMENT OF HON. BILL EMERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. **EMERSON**. Thank you very much, Mr. Chairman, colleagues, members of the committee. I appreciate this opportunity to testify before you today concerning the proposal by our colleague, Mr. Serrano, to extend and modify the bilingual ballot provision of the Voting Rights Act. I'm here today because I believe in the equality of opportunity and I believe in the full and informed participation of our citizenry in government, and I am opposing the bill by Mr. Serrano because I don't believe it does anything to further—and, indeed, it may detract from—those ideals.

As you may be aware, I'm one of the chief sponsors in the House of the Language of Government Act, a bill which would deem English to be the official language of the Federal Government. Through that bill and others, I have sought to make this Nation more inclusive. Simply put, there are too many people, too many people in this country, who can't fully participate in our society because of language barriers. We agree, there are language barriers to be overcome. I agree with that. There are language barriers to be overcome, as well as potential language barriers which we should never allow to be erected. And our question now really is, how do we do that most effectively? I don't believe that the answer lies with bilingualism. Government-mandated bilingualism simply will not work. It may be designed to be inclusive, but in reality it is separatist in nature. It would create two neighboring, separate but equal cultures, and it would begin to tear at the fabric of what makes us Americans, unique, unique in our diversity.

Bilingual ballots don't work, either. This provision of the Voting Rights Act has been around for almost 17 years, and the voting participation rate among Hispanics of voting age has not increased over that time. In 1974, for example, 22.9 percent of Hispanics of voting age voted in congressional elections. In 1990, the participation rate among the same group was 21 percent. These numbers are compared with 44.7 percent of the general population voting in 1974 and 45 percent of the general population voting in 1990. The participation gap has not narrowed, despite the law mandating bilingual ballots.

Mr. Chairman, I have given this issue a great deal of thought. Like Mr. Serrano and several of my distinguished colleagues who support this bill, I am concerned that we should not tell any citizen, either in appearance or in fact, that he may not vote. Still, I oppose this 15-year extension of the bilingual ballot provision. Some will undoubtedly call this discrimination. And I would suggest that bilingual ballots themselves are a form of discrimination. Limited English proficiency is not an immutable trait. In fact, it is easily remedied. A federally mandated supply of bilingual ballots and election material sends a message to limited English citizens that says it's OK; we don't really expect you to learn English anyway. By mandating bilingual ballots, we really are not helping those who use them. Ballot or no ballot, it is nearly impossible to succeed in this country, to improve one's station in life, without a knowledge of English. English is the language of opportunity in our society, and we owe it to our citizens to enable them to take advantage of that opportunity 365 days a year, not just on the first Tuesday after the first Monday of November in even-numbered years.

Even if we assume, for the sake of argument, that every citizen is entitled to vote in languages other than English and will benefit from voting in her most comfortable language, the protection of this essential right, which is provided by this bilingual ballot provision, is, unfortunately, mediocre and spotty at best. The act requires 5 percent of a given population to qualify as "language minority" in order to trigger coverage of the act.

Now Mr. Serrano would expand coverage, requiring bilingual ballots in any community in which there are 10,000 citizens of a single language minority. If non-English voting is such an important fundamental right, why should an individual's ability to exercise that right depend on whether she or he is surrounded by at least 9,999 others who share his or her weakness in English? This system is clearly arbitrary, and it shows concern not so much for individuals, but for certain select groups. By setting an arbitrary standard for the exercise of the franchise, we are, in effect, I'm afraid, encouraging segregation along linguistic lines. A better idea would be to forgo the mandates, to allow municipalities to print non-English voting assistance materials as they see fit, and to instead devote our resources and our energies to ensuring that every citizen has a meaningful opportunity to learn English, so that he or she may fully participate—fully participate—in our political system and process.

Language assistance should be available on an as-needed basis, so that no citizen is disadvantaged while he or she is in the process of becoming fluent in English. Bilingual ballots do not increase voting participation by language minorities, nor do they guarantee, as proponents have argued, the ability to "cast an independent, informed vote." And independent and informed vote depends not so much on the language of the ballot, but on the ability to make an independent and informed decision after listening to the candidates and learning about the issues. Bilingual ballots will do nothing to assist language minorities in this respect; teaching them English is the remedy.

Thank you, Mr. Chairman. That concludes my statement.

Mr. EDWARDS. Thank you very much, Mr. Emerson.

[The prepared statement of Mr. Emerson follows:]

BILL EMERSON
MEMBER OF CONGRESS
8TH DISTRICT, MISSOURI

HOUSE COMMITTEE ON
AGRICULTURE

HOUSE COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION

SELECT COMMITTEE ON HUNGER

Congreſs of the United States
House of Representatives
Washington, DC 20515-2508

OFFICES
SUITE 2454
RAYBURN BUILDING
WASHINGTON, DC 20515-2508
202-225-4404

THE FEDERAL BUILDING
339 BROADWAY
CAPE GIRARDEAU, MO 63701
314/335-0101

612 PINE
ROLLA, MO 65401
314/364-2455

TESTIMONY OF THE HONORABLE BILL EMERSON
BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY
April 1, 1992

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify before you today concerning the proposal by my colleague, Mr. Serrano, to extend and modify the bilingual ballot provision of the Voting Rights Act. I am here today because I believe in equality of opportunity, and I believe in the full and informed participation of the citizenry in government. I oppose the bill introduced by Mr. Serrano because it does nothing to further, and indeed may detract from, those ideals.

As you are no doubt aware, I am one of the chief sponsors of the Language of Government Act, a bill which would deem English the official language of the federal government. Through that bill and others, I have sought to make this nation more inclusive. Simply put -- and I don't think anyone here today would argue with this point -- there are too many people in this nation who cannot fully participate in our society because of language barriers. We agree: there are language barriers to be overcome, as well as potential language barriers which we must never allow to be erected. Our question now is, how do we do that?

The answer does not lie in bilingualism. Government-mandated bilingualism simply does not work. It may be designed to be "inclusive," but in reality, it is separatist in nature. It would create two neighboring "separate but equal" cultures, and it would begin to tear at the fabric of what makes us American, unique in our diversity.

Bilingual ballots do not work, either. This provision of the Voting Rights Act has been around for nearly 17 years, and the voting participation rates among Hispanics of voting age has not increased over that time. In 1974, for example, 22.9 percent of Hispanics of voting age voted in the congressional elections. In 1990, the participation rate among the same group was 21.0 percent. These numbers are compared with 44.7 percent of the general population voting in 1974 and 45.0 percent of the general population voting in 1990. The participation gap has not narrowed, despite the law mandating bilingual ballots.

Mr. Chairman, I have given this issue a great deal of thought. Like Mr. Serrano and the several of my distinguished colleagues who support this bill, I am concerned that we should not tell any citizen, either in appearance or in fact, that he may not vote. Still, I oppose this 15-year extension of the bilingual ballots provision. Some will undoubtedly call this " discrimination." I would suggest that bilingual ballots themselves are a form of discrimination. Limited English proficiency is not an immutable trait; in fact, it is easily remedied. A federally-mandated supply of bilingual ballots and election materials sends a message to limited-English citizens that says, "It's okay -- we don't really expect you to learn English anyway." By mandating bilingual ballots, we really are not helping those who use them. Ballot or no ballot, it is nearly impossible to succeed in this country -- to improve one's station in life -- without a knowledge of English. English is the language of opportunity in our society. We owe it to our citizens to enable them to take advantage of that opportunity 365 days per year, not just on the first Tuesday of November.

Even if we assume for the sake of argument that every citizen is entitled to vote in languages other than English and will benefit from voting in her most comfortable language, the protection of this essential right which is provided by this bilingual ballot provision is mediocre and spotty at best. The Act requires five percent of a given population to qualify as a "language minority" in order to trigger coverage of the Act. Mr. Serrano would expand coverage, requiring bilingual ballots in any community in which there are 10,000 citizens of a single language minority. If non-English voting is such an important fundamental right, why should an individual's ability to exercise that right depend on whether she is surrounded by at least 9,999 others who share her weakness in English? This system is clearly arbitrary, and it shows concern not so much for individuals, but for certain select groups. By setting an arbitrary standard for the exercise of the franchise, we are in effect encouraging segregation along linguistic lines.

A better idea would be to forego the mandates, to allow municipalities to print non-English voting assistance materials as they see fit, and to instead devote our resources and energies to ensuring that every citizen has a meaningful opportunity to learn English, so that he or she may fully participate in our political system. Language assistance should be available on an as-needed basis, so that no citizen is disadvantaged while he is in the process of becoming fluent in English.

Bilingual ballots do not increase voting participation by language minorities; nor do they guarantee, as the proponents have argued, the ability to "cast an independent, informed vote." An independent and informed vote depends not so much on the language of the ballot, but on the ability to make an independent and informed decision after listening to the candidates and learning about the issues. Bilingual ballots will do nothing to assist language minorities in this respect; teaching them English is the only remedy.

Mr. EDWARDS. Mr. Hyde, do you have an opening statement or questions? Both?

Mr. HYDE. Well, I've got a statement. I'll just ask unanimous consent to put it in the record.

Mr. EDWARDS. Without objection.

[The prepared statement of Mr. Hyde follows:]

OPENING STATEMENT

OF

HON. HENRY J. HYDE

ON EXTENSION OF SECTION 203 OF THE VOTING RIGHTS ACT

The Fifteenth Amendment to the Constitution provides that "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." Yet it was not until the passage of the Voting Rights Act in 1965 that America began to make good on this majestic promise.

As a result of the powerful provisions of the Voting Rights Act, especially the preclearance provisions, Blacks made considerable progress toward significant participation in the political process within a relatively short time period. In 1964, for example, Alabama's black registration was 23.1 percent, but by 1976 it was 58.1 percent. In Mississippi, only 6.8 percent of blacks were registered to vote in 1964. In 1976, that number had increased dramatically to 67.4 percent.

The principle underlying the entire Voting Rights Act is that it is "very, very strong medicine" entailing a "substantial departure from ordinary concepts of our federal system." In our federal system intrusion into state and local affairs should be restricted to only the most serious and emergent situations.

I know in 1975 and 1982, many of my colleagues on the Judiciary Committee -- including current Chairman, Jack Brooks, a tireless advocate of civil rights, argued that there was not "substantial evidence" to justify the multi-lingual provisions of the Federal Voting Rights Act. In his additional views in the 1975 Judiciary Committee Report he stated:

> . . . Congress, and especially the Judiciary Committee, should enact far-reaching constitutional legislation only when it is supported with solid evidence. To date, I question whether adequate evidence exists.

In order to justify extension, or even expansion of Section 203 as is being proposed to this Subcommittee, we need to find evidence today -- Is there discrimination [illegible] of the nature and severity faced by Black Americans in the 1960's which first justified massive federal intrusion into the authority of state and local governments to run elections.

When we last looked at this issue in 1982, seven years after the inception of the minority-language assistance provisions, I was told that the program would be temporary -- to meet a perceived emergency that would be solved in a relatively short time. Now, we are here, facing a proposal to extend and expand this program for another fifteen years.

There is more at stake here, however, than the constitutional, legal and factual issues, I am deeply troubled by a growing sense that our Nation is fragmenting -- divided along cultural and language lines. I would like to share from a~~n~~ "column" ~~editorial~~ by Charles Krauthammer which appeared in the Washington Post in August of 1990. In the editorial, he stated:

> "America, alone among the multi-ethnic countries of the world, has managed to assimilate its citizenry into a common nationality. We are not doing our best to squander this great achievement.

"Spain still has its Basque secessionists, France its Corsicans. Even Britain has the pull of Scottish and Welsh to say nothing of Irish nationalists. But America has, through painful experience, found a way to overcome its centrifugal forces.

American culture has been built on a tightly federalist politics and a powerful melting pot culture. Most important, America chose to deal with the problem of differentness (ethnicity) by embracing a radical individualism and rejecting the notion of group rights. Our great national achievement -- fashioning a common citizenship and identity for a multi-ethnic, multi-lingual, multi-racial people -- is now threatened by a process of relentless, deliberate Balkanization. The great engines of social life -- the law, the schools, the arts -- are systematically encouraging the division of America into racial, ethnic and gender separateness.

Countries struggling to transcend their tribal separateness have long looked to America as their model. Now however, America is going backward. While the great multi-ethnic

> states try desperately to imbue their people with a sense of shared national identy, the great American institutions, from the courts to the foundations, are promoting group identity instead.
>
> Without ever having thought it through, we are engaged in unmaking the American union and encouraging the very tribalism that is the bane of the modern world."

We need to carefully think through what we are about to do today. I'm certain all here would agree that Congress should not mindlessly extend or expand Section 203 without the hard evidence to support its continuance. This Subcommittee needs to get beyond the assertions and the anecdotes to the facts. I want to hear voting participation rates, percentages, calculations. Is there a substantial gap between minority-language and English-speaking voter participation? How have the last fifteen years of minority-language voting assistance narrowed any gap? What has been the cost -- botn financial and social -- to this nation. Is there evidence of widespread intentional and invidious discrimination against language minorities that justifies massive federal intervention for an additional 15 years? These are the questions which this Subcommittee needs to fully explore as it considers whether to extend Section 203.

I want to welcome each of the witnesses and look forward to hearing their testimony. Thank you Mr. Chairman.

Mr. HYDE. Yes, I do have some questions, if I may. Either Mr. Ortiz or Mr. Serrano, or both, what evidence is there that multilingual voting materials increase voting participation? Have you got some hard evidence?

Mr. ORTIZ. I think that the study that Mr. Serrano referred to, conducted by the National Council of La Raza and MALDEF, does show that by providing bilingual information that the people will come and vote. For so many years, Mr. Chairman, the Hispanic community has been intimidated. They're just beginning to participate. They were intimidated by the Border Patrol, by many law enforcement agencies, to the point where they were even scared to go out anywhere, for the fear that they will be kicked back to another country.

But we do have, and I think I will relate now to the—or yield to Mr. Serrano who has some of the evidence that he's worked on so hard.

Mr. SERRANO. Well, the evidence is the studies done by the various organizations that could be submitted to you, but there's also evidence, Mr. Hyde, that we can't simply put on paper what many of us have experienced. I can tell you that in the Bronx, were it not for the abilities we now have to give the assistance of interpreters, and so on, that a large segment of the community would still be intimidated by the voting process because their language is not up to par. Now, interestingly enough, in the Bronx you're faced with a classic situation in that many of the people I'm talking about are Puerto Ricans who were born American citizens and we could question why American citizens speak another language, but that's a subject for another day. That is a situation that exists, and people like my parents and relatives and others who are not of my generation needed the assistance, and continue to need the assistance, in order to participate.

Let me just, if I may, also make a comment in commenting on something that our colleague, respective colleague, Mr. Emerson, made. That is that I know the importance, and I will agree with all do not support this bill, the importance of learning to speak English. Perhaps if we ever agreed that you should not have certain privileges in the society for not speaking the language, we could discuss a driver's license; we could discuss maybe being a Member of Congress or something else. But voting should be the one right in the society that should not be based on your physical condition or on your ability to speak a language, and so on.

Mr. HYDE. Or group membership.

Mr. SERRANO. Exactly. If you're a member, if you're a registered voter, if you are a citizen of this country, you should not be in any way disallowed the opportunity to vote. This does help people participate in the process.

Mr. HYDE. Then we should eliminate the 5-percent requirement or your suggested 10,000. If anybody needs help, they should get it.

Mr. SERRANO. Well, Mr. Chairman, obviously, the comment made by Mr. Hyde is one that we would all subscribe to, but when we legislate—I know this in my 2 years in this Congress and my 16 years in the New York State Assembly. When we legislate, we do make provisions for how we legislate, I would wish that we had an opportunity where there would be some computer somewhere where every citizen in this country would push a button and come up English proficient or limited English proficient, and they would be covered, but you don't do that, just the same way that in legislating any appropriation or any legislation you set targets, and the targets may not be what everybody wants them to be, but they are a departure from where you were last time.

Mr. HYDE. What do you have to say to the U.S. Census figures which in 1978 showed a gap between voting of the white population and the Hispanic citizen of 14.5 percent. In 1982, that gap was 14.5 percent. In 1990, the gap was 15.2 percent.

Mr. SERRANO. Two things——

Mr. HYDE. One would think the gap would narrow because the provision of bilingual ballots, wouldn't one?

Mr. SERRANO. Well, two things. First of all, let's remember that voting assistance or the Voting Rights Act assistance is not just in ballots, but it's in registration and in the materials needed to register to vote.

To the census, I would say the following thing: First of all, you should also throw in the figures of how Americans in general have been decreasing in their numbers of voting, and that Hispanics, in fact, have been increasing because, while the percentages may stay at a certain level, the actual numbers have risen, but the population grows and the percentages then become a game of play.

Let me read to you very briefly from a report by the NALEO, which is the National Association of Latino Elected Officials. "Bilingual assistance has enabled greater numbers of Latino voters to participate politically. Statistically, voter registration and turnout have increased among Hispanics. In New York City, Latino voter registration increased 17 percent between the years 1988 and 1991," according to the National Association of Latino Elected Officials. "The number of Latino elected officials more than doubled in the 9 years between 1973 and 1984 in six States with large Latino populations: Arizona, California, Florida, New Mexico, New York, and Texas.

"The number rose from 1,280 in 1973 to a total of 2,793 in 1984. New York State from 1989"—and I'm ending now—"until 1992 saw an increase in the number of Puerto Rican and other Latino elected officials of 13 from 15 in 1989 to 28 in 1992. This growth in the number of Latinos elected to public office is attributable in large part to the Voting Rights Act and to the bilingual voting assistance."

This is the information of a very distinguished group that does much more research than I do, and I would say that part of what happened in New York City last year, where we went from three Latino members of the city council to nine in one election, was due in large part to the fact that some people who were American citizens—and, interestingly enough, were accepted as American citizens, speaking a certain amount of English and reading a certain amount of English, but needing help to vote—were then given that assistance at the polls.

Mr. HYDE. We have in Chicago one of the most fascinating new congressional districts in the country, combining two Latino communities which are separate geographically. We have connected them with a narrow strip. It looks like a pair of earmuffs. You have people, people, and you have a connection [indicating], and it's surrounding another district. But we're going to have an Hispanic district in Chicago.

One last question——

Mr. **SERRANO**. Incidentally, I thank you for that district because it's going to take care of my loneliness in Congress, since I won't be the only Puerto Rican any longer in Congress.

[Laughter.]

Mr. **HYDE**. Well, you may get a Mexican; we don't know who will dominate in that area, but he'll have an interesting district.

Last question: Do you think undocumented persons should be permitted to vote in local elections?

Mr. **SERRANO**. Yes, sir. Undocumented or——

Mr. **HYDE**. Undocumented persons.

Mr. **ORTIZ**. Do you mean not citizens or just undocumented——

Mr. **HYDE**. Oh, well, if they're citizens, they have a document. Let me use the phrase I've tried to avoid, "illegal alien."

Mr. **SERRANO**. I don't think illegal aliens, Mr. Chairman, do show up at any kind of local election.

Mr. **HYDE**. I'm asking you if they should be permitted to vote.

Mr. **SERRANO**. I think that legal aliens who are not citizens should be allowed to vote in local elections, like in New York City where noncitizens vote in New York City school board elections.

Mr. **HYDE**. If they're in the country legally but they're aliens, they should vote?

Mr. **SERRANO**. Absolutely.

Mr. **HYDE**. If they're in the country illegally, should they vote?

Mr. **SERRANO**. If they're in the country illegally, they shouldn't be in the country. So they're not going to be around asking for any help in voting.

Mr. **HYDE**. They'll be around, but they won't be rushing in to vote?

Mr. **SERRANO**. They won't be rushing in to vote; I assure you of that.

Mr. **HYDE**. Do you agree, Mr. Ortiz?

Mr. **ORTIZ**. I might be in a little different position because my district borders Mexico. I think that—and this has been relayed to me by my citizens, that they think that people who are here illegally or who are not documented should not participate in the election process.

Mr. **HYDE**. In other words, a tourist could vote in Mr. Serrano's, under his rubric, who would come in legally and be in the country. He's a legal alien, I guess.

Mr. **SERRANO**. No, Mr. Chairman, we're talking about somebody who is here legally whose documented, who is yet not a citizen. The question in New York was, should these people be allowed to vote in elections other than the elections we know of, local school board elections? In New York City the determination was made that a legal, documented alien who paid taxes, who worked here, and who had children in the school system should be allowed to vote in the local elections. We made that provision. In no way has it hurt anyone. On the contrary, we feel in many cases, and we know of at least three people I know, who by voting that way got excited about voting and made sure that when they were here 5 years they applied for their citizenship.

Mr. **Hyde**. Thank you.

Mr. **Ortiz**. But I think, Mr. Chairman, that this is entirely another issue and has nothing to do with the Voting Rights Act that we're discussing this morning. Thank you, Mr. Hyde.

Mr. **Hyde**. Well, I appreciate the instruction.

Mr. **Ortiz**. Sure.

Mr. **Hyde**. Thank you.

Mr. **Edwards**. Mr. Washington.

Mr. **Washington**. Thank you, Mr. Chairman.

I'd like to ask my four colleagues the same question. Would any of you disagree with the assertion of the statement that the best democracy is one in which all of the people participate?

Mr. **Emerson**. I would not disagree with that.

Mr. **Ortiz**. I wouldn't either.

Mr. **Serrano**. I wouldn't either.

Mr. **Washington**. Then we strive toward that goal as best we can, being fallible human beings. It's perhaps too radical a thought to even suggest, but I believe with every right there's a correlative duty and with every privilege an obligation. If we had a system in which people who received a benefit from the Government—either the city government, the State government, or the Federal Government—whether it were a Social Security check or a driver's license or any of the benefits or privileges that government affords to its people, that in exchange for that we ask a simple task, that they participate in their government by choosing the people who will run these organs of government that ultimately decide whether they get a driver's license or a passport, or whether their child goes to this school or that school. Is that too radical to suggest, that every person be required to vote?

Mr. **Emerson**. Well, I think that's something that has to be worked out in the democratic process. I would be theoretical about this and say that not voting is, indeed, a way of voting. It's very difficult to quantify that, but a lot of people say "none of the above." A lot of times the ballot doesn't give them the opportunity to vote "none of the above," so they don't vote.

Some countries, I know, do have mandatory voting. I haven't thought that one all the way through. I would reiterate here for emphasis that part of the point of my feelings that I've stated here today is that I do believe in this country that English is the preeminent language, always has been. I think it's the door-opener. It's the language of inclusion. I do not want to see this country move toward separatism based on language lines such as is happening very tragically in Canada, most specifically Quebec today. Their biggest problem there is language.

There's reams, tons, tomes of data that show that people in this country who know English are going to do an awful lot better by knowing English in the economic arena than without it; that there's just—more opportunities are going to be available to them. I know that people on the other side of the fence have disagreement with me on this, but I wish they'd understand that my object, my motive is really to open doors, and not to close them.

Mr. **WASHINGTON**. I don't think that people really disagree. I certainly don't presume to speak for any of the eloquent Members of Congress who can speak for themselves, but I would not disagree at all with your assertion that people are better off if they learn English. But it seems to me they are two different matters that can be separated. We can keep that as a goal, but we don't want to withhold the franchise while we wait until people learn to speak English before they get the right to vote.

Mr. **EMERSON**. In my statement—and I don't mean to interrupt the gentleman——

Mr. **WASHINGTON**. No, no.

Mr. **EMERSON**. In my statement I suggested that I have no problem—I think this is something that should be left to municipalities, to local election officials. I think assistance in voting is not inappropriate. We permit it in many different arenas—the elderly. I have a lot of elderly population in my district and I know that people go out and help ensure that people in nursing homes are able to vote, and they have some assistance. But that's all handled at the local level.

I'm talking about in this legislation mandates. I have no qualms with local government facilitating the electoral process by providing language assistance.

Mr. **WASHINGTON**. It has been my experience, though, that it depends upon the good wishes of the local officials. I certainly wouldn't want to leave that to chance, given the history we've had in this country, both with respect to Hispanic-Americans, Indian-Americans, Asian-Americans, and black Americans. We are a bit suspicious of devices and artifices that are placed in our way to prevent us from voting, and well we should be. Eternal vigilance is the price of liberty, and if we don't keep our eye on the ball, the right that we didn't have 30 years ago will be taken away from us again.

I agree with you, that all that you say is altruistic and things that we ought to be working toward. But as long as I know that they exist out there, my naivety will not allow me to remove the fact that out there somewhere is someone who doesn't want Hispanic people to vote, for whatever reason. And whatever reason that is isn't good enough. I don't need a reason. If you're trying to stop somebody from voting, any group of individuals from voting, because they happen to be a member of that group, like Mr. Hyde said, that to me is antithetical with this democracy that our Constitution promises. So everything that becomes a hurdle to that—maybe sometimes we err on the side of knocking down too many hurdles, but isn't it better to knock down one too many than to leave up one?

Any person who is dissuaded from going to vote because somebody is standing outside the polling place and they're wearing something that looks like it might be an Immigration and Naturalization Service uniform is intimidating. Anybody who does that doesn't believe in the democracy that you and I believe in. They don't love democracy like you and I do, Mr. Emerson.

Mr. **EMERSON**. It would be very difficult to take issue with what you say. You're presenting a theoretical case. I hope we're beyond that point.

I would still come back to the fundamental point that the easier we make it for people not to learn the common language of this country, the more difficult it is for them to participate in all of the benefits of our society.

Mr. WASHINGTON. I agree.

Mr. EMERSON. Maybe we're both right; I don't know.

Mr. WASHINGTON. I agree, but I heard my colleague say—and that makes some sense to me—that the more you allow people to participate, the more you give them incentive to learn the language. You know, put it on the politicians. If I'm out there trying to get 20,000 Hispanics, Spanish-speaking voters, then I've got to put my campaign material in English and in Spanish, which enhances me as an individual, but it also gives them an opportunity. If they start to find out about me through television commercials, or whatever, in Spanish, and they get curious about me as a candidate, that enhances, it seems to me, the possibility that they're going to learn some English, if nothing else, in the process of trying to find out who is this jerk that's running for Congress.

So what I'm saying is that I agree with what you say, but I think that you perhaps have too much faith in human nature and I have reason to believe that that human nature doesn't rise to your level of expectation. Believe me, there are people out there who would disenfranchise groups of people, regardless of who they are, whether they be blue people or orange people or whatever.

So whatever we need to do to work on the ultimate goal that you have of getting us to the point where all of us speak English and some other language—I mean, I speak English; I speak jive, too, so I'm bilingual.

[Laughter.]

Mr. WASHINGTON. But the point is that that's a goal, but we must be careful not to withhold the franchise for lieu of us being able to reach that goal. It's the failure of the school system; it's the failure of these institutions to get all of our citizens to the point where they do have this desire to speak English, and most of them do have the desire. But it's awfully trivial of us, it seems, to say, well, until you jump through these hoops and do this little hop scotch thing that we want you to do, you can't vote.

Mr. EMERSON. Well, if I may respond——

Mr. WASHINGTON. Sure.

Mr. EMERSON. You were asking all four of us; I don't mean to dominate this here.

Mr. WASHINGTON. No.

Mr. EMERSON. But you've raised some very interesting issues here. I want to say to you, because I think there's a lot of merit—you and I could sit down and maybe sort all this out. As the principal sponsor in the House of the Language of Government Act, I have also—I believe deeply in the need to educate our young people and others in other languages. I was a very strong advocate in the higher education bill the other day of the Panetta amendment to provide enhanced language assistance.

Mr. WASHINGTON. Yes.

Mr. EMERSON. I think that I am a cosponsor of every piece of legislation in the Congress, in the House, to promote the opportunity of learning other languages.

Mr. **WASHINGTON**. Yes.

Mr. **EMERSON**. I think it's critically important to us in the ever-changing world in which we live that we be able to speak certainly Spanish and Russian and Japanese, and you name it. So I'm not excluding the knowledge of or learning other languages. I'm saying that in the United States of America that English is the door-opener and it's the door-opener to full participation across the board in our democratic processes, in our economic system.

I want to do everything that I can to encourage every American to know English, and know English well, because I don't believe you can succeed unless you can communicate in the mother tongue. I also want all Americans, wherever possible, to learn other languages as well, in order to be more efficient in their relationships with people of other tongues.

Mr. **EDWARDS**. The time of the gentleman has expired.

Mr. **WASHINGTON**. May I just have one further question, Mr. Chairman? I'm going to have to leave for another meeting. I would hope you would indulge me to respond to my friend from Missouri.

No one questions your motive. I think that we all know that your motives are deeply felt and that you are looking for the best interest of all people. You're not trying to divide people; you're trying to bring people together.

One example of why I feel so strongly about this measure as I do, in my county—I'm from Harris County, which includes Houston, TX. Before redistricting, we had 310 voting precincts in Harris County. As a result of redistricting with the creation of one additional congressional district, a part of another State Senate district, two more House districts, and the like, we ended up with over 1,000 voting precincts. We had an election on super Tuesday, as you know. Many people were confused by that.

I went by the voter registrar's office in our county, which is the county clerk. She told me that there were 3,000 different ballot configurations that were required, because we have a State law that says that a voting precinct cannot be in more than one State, Senate district, or congressional district, or House district, or any of these geographical districts, for the obvious reason that you don't want to have people overlapping two—some people living on one side of the street voting for one State senator and some people on the other side voting for a different State senator.

That required us, then, to move from 310 voting precincts to over 3,000 different ballot combinations. So that when a person comes in, you determine which one of these 3,000 different ballot configurations is required.

My point is, if you can do that in order to give a person 1 of 3,000 ballots, can't you do that on a language ballot, to go back to Mr. Hyde's question? Ought we have a zero triggered in so that every person can vote? If a person comes in, if they only speak some Asian language, Vietnamese or whatever, or Hispanic, or some variation of the Hispanic language, whatever the language that the person speaks, if we can do that, if we can come up with 3,000 different combinations of ballots to satisfy those who speak English, why can't we make among those 3,000 different ballot configurations all the other languages that the rich history of our country demands that we have?

Mr. **Emerson**. Well, if you're asking me——

Mr. **Washington**. I'm asking all of you.

Mr. **Emerson** [continuing]. I would say, once again, that I agree with you. That's why I object to the numbers, 5,000 or 10,000, but I think accommodating the language assistance need is best undertaken at the local level. I just think we get into, when you mandate this at the Federal level for the whole country, that enforcement in an equitable way becomes very, very difficult. I think you can handle that in Harris County, TX. And I think that language assistance should be available at the local level. That's why I said in my statement I don't agree with the numbers of 5,000 or 10,000.

Mr. **Edwards**. I believe we have to move on. We have a great number of other witnesses.

Mrs. Mink, I'd like to ask you one question and then we will try to go on to the next witnesses.

Has the Voting Rights Act been effective in Hawaii?

Ms. **Mink**. Yes, I think so. My population was vastly altered by the enactment of the 1965 Immigration Act. Up until that time, as you know, Asians were basically excluded or there was a very small number permitted to enter the country. So what we had to deal with was the population that had come to Hawaii to live prior to the exclusion act, and so the numbers were dwindling.

But after the 1965 act, and its implications for immigrants all over the Pacific Rim to enter into Hawaii, the voting rights requirements with respect to bilingualism, in addition to great emphasis placed by my State in accommodating the concept of access, I think made it possible for large numbers of people in my community to vote.

We have a very high percentage of participation. The registration is alarmingly low, but once individuals are registered, because of the assistance provided, these individuals go to the ballot box in numbers in excess of 80 percent in every election. So our efforts have to be in terms of getting people to register, and that's the assistance which I believe this act will provide. I think the last statistics we saw, the eligible people registered in my State still hovered around 50, 55 percent.

So I'm very much in favor of this. I don't think that this is a debate of the importance of speaking English. I don't think anyone in my community denies that that's important, and we put great emphasis in education, and the ability to be conversant in all the requirements of English is paramount in everybody's upbringing. From the moment they enter America and Hawaii, becoming proficient in English is a primary goal.

But that's not what we're debating today. What we are debating today is from the moment you become eligible to be a citizen of this country, access to the ballot box is essential. To every extent that the Federal Government can make this access more real, more inclusive, more encouraging to local communities to do justice, as has been suggested, enlarge that opportunity with greater assistance, not be limited to the 10,000 or the 5-percent which my State has done, it seems to me we are then accomplishing what this democracy is all about.

I don't believe in requiring people to vote because that's not my understanding of freedom. I believe it should be available, and to every extent possible the Federal Government should make that access real. If language is a barrier, which I believe that it is, indeed, a barrier, then encouraging the display of bilingual materials, allowing people to understand the process and how to register, and how to vote in the open primary system, which is very complicated in my State, it seems to me that all of those efforts go to making democracy more real.

Mr. EDWARDS. Well, thank you very much. That's very helpful. And thanks to all the witnesses. We are all very grateful to you.

Will the next panel, panel two, please come to the witness table? Dr. Garcia, Ms. Wolfley, Mr. Lanigan—Linda Chavez is ill and can't be here—and Mr. Tryfiates.

Well, we welcome panel No. 2. Since we have a number of other witnesses after this, we're going to use the usual procedure of the Judiciary Committee. You will see a little red light go on when you have reached sort of the end of your testimony, and you can try to wind up then, please. We want to be fair to the other witnesses.

Without objection, the excellent statements—and we have read them all—of all four members of the panel will be made a part of the official record.

The first member of this panel to testify is Dr. John Garcia, currently chairman of the department of political science at the University of Arizona in Tucson. Dr. Garcia also served as one of the main researchers in the 1991 National Latino Survey. Dr. Garcia.

STATEMENT OF JOHN A. GARCIA, PH.D., DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF ARIZONA

Dr. GARCIA. Well, thank you very much, Mr. Chairman. Thank you Judiciary panel for giving me the opportunity to address you on this issue of the Voting Rights Act. My comments, you'll notice in the written statement, address the issue of language assistance. I will try to briefly highlight what I think are the critical points of information.

As the chairman indicated, the Latino National Political Survey, which was conducted in 1989 and 1990, was the first national probability survey of Latinos in the United States particularly oriented toward issues of politics, political participation, attitudes, and so forth. And so I think much of my information, because I think this is an area that operates largely on anecdotes and experiences which are obviously not only relevant, but also, more important, there's a question of just specific information we can address to questions about language use, use the ballot, et cetera. So my comments are focused more on the results from our survey to perhaps shed some light on the issue or the need for continued language assistance among Latinos in the United States.

The Latino National Political Survey was conducted in 1989 and 1990. We interviewed over 2,800 Latinos—that is, specifically persons of Cuban, Puerto Rican, and Mexican origin—throughout the United States, which represents about 90-plus percent coverage of all those three populations. Again, these three populations comprise about 80 percent of this Hispanic category.

One relevant piece of information for the voting rights extension is that language used in interviews—that is, our respondents had a choice to do the interview in either English or Spanish or, in fact, if they wanted to switch, they could switch from one language to the other. The result is that over 56 percent of our respondents completed their interview in Spanish. Again, if we look at specific subgroups, almost 80 percent of all the Cubans that we interviewed in our survey conducted the interview in Spanish; 55 percent of our Puerto Ricans we interviewed conducted the interview in Spanish; and 47 percent of our Mexican-Americans did the interview in Spanish, which strongly suggests that there is a strong persistence of language use. Again, individuals had the option to do one or the other language which they felt most comfortable in. And, again, the number suggests that a good number of Latinos in the United States still use Spanish on an everyday basis, and particularly was such that it's not just conventional Spanish, but in terms of issues of politics and political information, use of the media, et cetera.

The other thing that I think is relevant in this context is that 88 percent of respondents were either citizens or permanent resident aliens intending to become citizens. I know the Voting Rights Act is specifically targeted toward citizens' access to the ballot and the language assistance role in facilitating that, but it's important to know that, among this population, there are significant permanent resident aliens that are in this country, and a good number of these individuals are likely to be future citizens in the very near future.

That's why I think it's important to note that, again, 12 percent of our sample are naturalized citizens, and another 20 percent intend to become citizens or are currently applying to be U.S. citizens in the very near future.

If we look specifically at language use and ability, and we break it down in terms of proficiency, our data suggests that 20 percent of all our respondents are basically English-only respondents. On the other hand, almost 34 percent of our respondents are Spanish-only or Spanish-only-proficient. So, again, we have a good third of the population that has much greater skills in Spanish than in English.

Again, if you break it down by specific subgroups, we find again the persistence of Spanish among Mexican-Americans, about 29 percent; among Puerto Ricans, 26 percent; among Cubans, 54 percent. My intention is not to inundate you with numbers, but give you some sense of where the language distribution falls out.

If we look specifically at the citizenship of our population in terms of individuals or U.S. citizens, but again predominantly speak Spanish, 12 percent of the native-born citizens continue to be Spanish-only speakers and 39 percent of the naturalized citizens are also Spanish-only speakers, again suggesting that even among citizenship there is a significant segment of that population that continues to use Spanish.

Again, the other information which I will bring to light is that most of these individuals come in the category of lower income, lower education, but clearly the numbers indicate that a significant level of Spanish and limited-English proficiency still exists. Specifically, Latinos with little education and low income will be greatly affected if Congress fails to reauthorize its position. It should be noted that although a portion of the population is permanent aliens, the overwhelming majority of individuals are pursuing or

plan to pursue U.S. citizenship in the very near future. Extension of bilingual provisions in the Voting Rights Act would facilitate further the continuing political incorporations of newly naturalized citizens. So I'm just interjecting the idea that it's not only servicing our citizens, but eventually future citizens in the very near future would benefit by greater access to the ballot.

Thank you very much.

Mr. Edwards. Thank you very much, Dr. Garcia.

[The prepared statement of Dr. Garcia follows:]

Written Testimony
of
John A. Garcia (Ph D)
University of Arizona
Tucson, Arizona 85721

Issue: Reauthorization of section 203 Voting Rights Act

This written testimony represents the results of my research experience on the political behavior of Latinos, as well empirical results from the Latino National Political Survey (LNPS). The latter part represents a collaborative research effort by four co-Principal Investigators: Rodolfo de la Garza (University of Texas); Angelo Falcon (Institute for Puerto Rican Policy); F. Chris Garcia (University of New Mexico), and myself. The central focus of my testimony is to examine the language abilities of Latinos in relation to the language provision of the Voting Rights Act. More specifically, the primary language modes of Latinos are identified; then I examine any variations by socioeconomic status and national origin. In essence, this testimony tries to establish the continued need for language assistance among Latinos.

Latino National Political Survey

I will briefly outline the major methodological and content areas involved in this country's first national probability survey of persons of Mexican, Puerto Rican and Cuban origin residing in the U.S. These three groups constitute four-fifths of the total Latino populations. A total of forty primary sampling units were selected as the areas for selecting our respondents. Twenty-eight SMSA's were "self-representing" areas and the remaining twelve sites were clustered by geography (i.e. state), metro vs. non-metropolitan status, and concentration of Latinos in the area. Our face-to-face interviews were conducted with persons who had one parent or two grandparents of Cuban, Puerto Rican or Mexican origin. The approximately eighty minute survey was conducted during July, 1989 to March, 1990.

We interviewed 2817 persons of Mexican, Puerto Rican and Cuban origin. Of that total, there were 1546 Mexican origin, 589 Puerto Ricans, and 682 Cubans. In addition, we took a sample of non-Latinos from the same areas as the Latinos were selected (i.e. 598 non-Latinos). Our sample represents a population coverage for each of the three groups from 90.2% to 92.5%. The sub-areas from which Latinos were selected include low Latino density residential areas as well as areas with greater concentration of Latinos. As a result, twenty percent of the Latino respondents came from low density areas (less than 20%), and another twenty-five percent from areas of 20-49% Latino concentration. A total of 12,187 households were screened and 4,390 persons were eligible for our survey.

One relevant piece of information for the Voting Rights Act extension is the language used in the interview. Over fifty-six percent (56.8%) of the respondents completed their interview in Spanish. Another 3.5% did their interview in both Spanish and English. If we look at the percentage of Spanish language interviews for each of the groups, there is some variation.

Almost eighty-percent (79.1%) of the Cubans completed their interview in Spanish; while 55.2 percent of the Puerto Ricans and 47.4% of the Mexican American did their interviews in Spanish. Thus, the persistence of Spanish use is still very prevalent among Latinos in the U.S.

The LNPS covered a wide range of subjects dealing with political values, attitudes, and behaviors. More specifically, voting preferences and choices, partisanship, electoral activities, organizational involvement and knowledge, policy preferences and political familiarity were major sections of the survey instrument. While language was not the major foci, any study of Latinos needs to include items that tap language use and abilities. This survey represents the most current language ability information.

Finally, eighty-eight percent (88%) of the respondents were either citizens or permanent residents intending to become citizens. Fifty-one percent (51%) were native born citizens, another twelve percent (12%) were naturalized citizens, five percent (5%) were residents currently applying for naturalization, and twenty percent (20%) were residents who intended to apply for naturalization. Only eight percent (8%) of those interviewed indicated that they did not plan to apply for naturalization, two percent (2%) were undecided and another two percent (2%), refused, did not know or did not answer.

LANGUAGE AND BACKGROUND VARIABLES

Language Ability, by Origin, Citizenship

The survey's language ability data were secured from the authors for the purposes of this report. The 1990 Survey provides the most recent data available on the language ability of Latino voting age adults. The language ability assessment results were compiled by using two methods. The first method classified respondents into distinct language ability categories ranging from one to four. The second method classified respondents into nine categories, measuring in decreasing scale English Language ability to only Spanish language ability. In the first method, category one represents those respondents who are only English proficient; category two represents those who are mostly English proficient, category three represents those who are mostly Spanish proficient; and, category four represents those respondents who are only Spanish proficient. Proficiency refers to one's overall ability to read, write and converse in English and Spanish.

The survey finds that twenty percent (20%) of all the respondents are in category one. They are only English proficient. Twenty-two percent (22%) are in category two, or mostly English proficient. Twenty-three percent (23%) are in category three, or mostly Spanish proficient. Thirty four percent (34%) of the respondents are in category four, or only Spanish proficient.

The second method, which separates the respondents into nine English language ability categories, with finer language ability distinctions. Category one represents those respondents who are only-English proficient; while category nine represents those who are only Spanish proficient. The intermediate levels, two through eight, represent the differing (and scaled) levels of language ability categories of the respondents. These finer language groupings indicate that only about three percent (2.7%) of all the respondents fall into the only English proficient level (category one) while fourteen percent (14.2%) of the respondents fall into category nine and are only Spanish speakers. Eight percent (8%) fall in category two, the second most English proficient category, whereas, twenty-two percent (22.2%) fall into category eight, the second most Spanish proficient category. Fifty-five percent (55.5%) of the respondents fell into the five intermediate language ability levels.

Utilizing the results of the four category method also reveals differing levels of English proficiency among the different Latino groups. Twenty-nine percent (29%) of the Mexican origin respondents and twenty-six percent (25%) of the Puerto Rican respondents fell into category four (Spanish only). The Cuban population appears to have the largest percentage of only Spanish speakers with fifty-four percent (54%) of the Cuban respondents falling into category four. Twenty percent (20%) of the Mexican origin respondents are in category three, while twenty-nine percent (29%) of the Puerto Rican origin population and twenty-five percent (25%) of the Cuban population are in the same category.

These results demonstrate that a substantially greater portion of Latinos still communicate in Spanish or primarily in Spanish than in English or exclusively in English. Fifty-eight percent (58%) of Latinos fall in categories three and four; whereas forty-two percent (42%) fall in categories one and two. Among the subgroups, Latinos of Cuban origin appear to be less

English proficient than are other Latinos -- close to eighty percent (79%) of the Cuban origin population fall in categories three or four.

< Controlling the data for place of birth shows that thirty- six percent (36%) of the native born respondents are in category one, the highest English proficiency level. Only nine percent (9%) of the naturalized U.S. citizens were in the same category. Thirty-three percent (33%) of native born citizens are in category two; while only twenty percent (20%) of the naturalized citizens are in the same category. Nineteen percent (19%) of the native born citizens are in category three; while thirty-two percent (32%) of naturalized citizens were in the same category. Twelve percent (12%) of the native born citizens continue to be only Spanish speakers falling in category four; while thirty-nine percent (39%) of the naturalized citizens were in the same category.

Language ability , Educational Attainment and other Socio-economic factors.

The language results from the 1990 Survey also reveal a strong correlation between language ability, educational attainment, and household income. Those with lower levels of education tend to be predominantly Spanish speakers. As the educational attainment of the respondents increases, so does their English proficiency.

Those respondents who reported having a fifth grade education or less were overwhelmingly Spanish-speakers. Only one percent (1%) of the people in this educational category fell in category one (mostly English proficient) for language ability. Nine percent (9%) are in category two; whereas, twenty-eight percent (28%) are in category three and sixty-one percent (61%) are in category four (Spanish proficient). The Department of Census classifies persons as illiterate if they posses less than a fifth grade education when assessing factors for coverage under the bilingual assistance provisions of the Voting Rights.

Those respondents who completed between six and twelve years of schooling appear to be slightly more Spanish proficient than English proficient. Thirty-five percent (35%) of these respondents are in category four (Spanish proficiency). Twenty- three percent (23%) of these respondents are in category three, or mostly Spanish proficient. Twenty-one percent (21%) of the respondents in this language ability group fall into category one, and twenty-three percent (23%) are in category two.

There appears to be however, gradations of proficiency even within the 6-12 grade category. For example, those who completed only six to eight years of school, still appear to be predominantly, Spanish proficient, while those with ninth to twelfth grade educations, seem to increase their English proficiency levels. To highlight this point, I contrasted the language ability of those respondents with a sixth grade education and those with a twelfth grade education. Those with a sixth grade education were overwhelmingly Spanish proficient -- less than one percent (1%) fall into category one. Only six percent (6%) are in category two. On the other hand, twenty- seven percent (27%) fall into category three. The majority, sixty-five percent (65%), are in category four (Spanish proficient).

Those with a twelfth grade education, on the other hand, appear to be slightly more English proficient than Spanish proficient. Thirty four percent (34%) of these respondents are in category one, twenty-eight percent (28%) are in category two, twenty-one percent (21%) fall in category three, and seventeen percent (17%) fall into category four. The 1990 Survey also shows that thirty percent (30%) of those with more than twelve years of education are in category one (English proficient), thirty-one percent (31%) are in category two, nineteen percent (19%) are in category three, and eighteen percent (18%) are in the category four (Spanish only).

Other socio-economic factors also correlate with language ability. Household income, in particular, appears to be a significant correlating factor. Only twelve percent (12%) of the respondents who reported incomes below $14,999 ranked in category one of language ability. Twenty-one percent (21%) fall in category two, twenty-five percent (25%) are in category three, and forty-three percent (43%) fall in category four. Those who reported incomes between $15,000 and $34,999 still appear to be slightly more Spanish proficient than English proficient. Twenty-two percent (22%) of those in this income category fall in category one, twenty-five percent (25%) are in category two, twenty-three percent (23%) are in category three, and thirty three percent (33%) are in category four. Respondents with incomes of $35,000 and above were the most English proficient income group. Thirty-eight percent (38%) of these respondents ranked in category one, twenty-five percent (25%) ranked in the category two, twenty-one percent (21%) in the category three, and sixteen percent (16%) in category four.

Conclusion

For purposes of estimating the potential future need for bilingual election services, Congress has, in the past, looked to the English language ability of language minorities as well as the educational status of these minorities in relation to the general population. Current census information demonstrates that Latinos continue to grow in numbers, continue to retain a significant level of Spanish language, and concomitantly limited English proficiency. They also continue to be hampered by low educational achievement levels. The 1990 Latino National Political Survey corroborates the Census department's educational findings. The 1990 Survey also demonstrates a persistent and sizeable segment Latinos do not speak or understand English adequately enough to participate in the electoral process.

Information from the Census and the other sources cited in this chapter also point to general picture of those potentially disenfranchised by a failure to reauthorize the bilingual assistance provisions of Voting Rights Act. Specifically, Latinos with little education and low income will be greatly affected if Congress fails to reauthorize these provisions. It should be noted that although a portion of the Latinos are permanent residents aliens, the overwhelming majority of these individuals are pursuing or plan to pursue U.S. citizenship. Extension of the bilingual provisions of the Voting Rights Act would facilitate further the continuing political incorporation of newly naturalized Latinos.

Mr. EDWARDS. Jeanette Wolfley is a tribal attorney for the Shoshone Bannock Tribes of the Fort Hall Reservation in Idaho. Ms. Wolfley has also represented tribes in Indian disenfranchisement cases and has written a law review article entitled, "Jim Crow, Indian Style, the Disenfranchisement of Native Americans."

We welcome you.

STATEMENT OF JEANETTE WOLFLEY, GENERAL COUNSEL, SHOSHONE-BANNOCK TRIBES, FORT HALL INDIAN RESERVATION

Ms. WOLFLEY. Thank you. Mr. Chairman and members of the committee, I would like to briefly talk about my experience in the field of litigation regarding Indian voting rights, as well as a brief review of the historical disenfranchisement of native Americans in this country.

I currently represent the Shoshone-Bannock Tribes which are located in southeastern Idaho on the Fort Hall Indian Reservation. But prior to representing the Shoshone-Bannock Tribes, I worked for a law firm which had a specific voting rights project that dealt with the voting rights issue for native Americans throughout the United States.

On behalf of the Shoshone-Bannock Tribes, we urge an extension of the section 203 for another 15 years. We know that this is basically a reauthorization of section 203 which was passed a number of years ago, but we do believe that there needs to be a further extension at this time.

But we also support an amendment which would be for Indian language speakers. This amendment would provide language assistance coverage to Indian lands where 5 percent of an Indian reservation is non-Indian-speaking in the same native language. We believe that this amendment is particularly relevant for tribes which may be on a reservation, but the reservation is split, say, into four or five different counties.

Many of you may know the history of the Indian policy was to basically establish different tribes throughout the United States on Indian reservations. And after those reservations were established, then along came States being a part of the United States and they enacted their own county lines and State lines. Many of those county lines and State lines split Indian reservations into a number of counties or even State lines split reservations.

Under the current trigger of the section 203, many Indian tribes do not have available the language assistance because the current figure looks to county populations as opposed to Indian reservations or Indian populations. So many of them are left out of coverage and do not currently receive assistance under section 203.

I've heard some testimony here today regarding language, English being the dominant language in the United States. I would like to offer that the first language that was spoken in the United States proper was the native languages, hundreds of native languages, throughout this country. The Federal policy that has been established over the years has supported those Indian languages and has supported the separateness or the separate identity of native Americans throughout this country. I think it's evidenced by the recent passage of the 1990 Native American Languages Act that was passed in 1990, which is codified at 25 U.S.C. 2901.

As a part of that language bill, Congress specifically recognized that the United States has a responsibility to act together with native Americans to ensure the survival of their unique cultures and language. I think that that particular bill is relevant to our discussion here today.

As part of that bill, they also found that the U.S. policy would be to preserve, protect, and promote the rights and freedom of native Americans to use, practice, and develop native American languages. And they specifically found under section 2904 of that act that there would be no restrictions placed on native Americans to express their language in public proceedings, a public proceeding being a meeting, perhaps even a voting area in which campaigns may be conducted in native languages. So I think that Congress has already established that they have that responsibility to preserve and protect native American languages.

In addition to that particular preservation through that act, the United States also has a general trust responsibility to the Indian tribes which is unique from others, I guess, minority groups in the United States. The Federal Government can establish a different standard either for languages or assistance in the Voting Rights Act for Indians and not be in violation of any kind of equal protection under the Constitution.

The history of disenfranchisement for native Americans is something that is very much similar to the disenfranchisement that has happened to Hispanic-Americans as well as black Americans in the United States. I think that there are some distinctions, though, in that even though the United States basically disenfranchised over the 500-year period native Americans, Indians have still tried to participate in the State electoral system, the Federal system.

But many times, because the Federal Government under the 14th amendment did not include Indians as citizens under the U.S. Constitution, so right from the beginning the Federal Government was trying to utilize the device of citizenship to get Indians to basically enter the mainstream majority society. When they sought to do so, then what happened on the local and State level was that they were basically disenfranchised.

One of the first cases that was litigated before the U.S. Supreme Court involved an Indian by the name of Mr. Elk from the Omaha Tribe in Nebraska. He had attempted to sever his ties from his Omaha Tribe and basically become a respectable white farmer in Nebraska. But what happened was he was denied that right.

I'd like to just make a couple more points here, if I may. Section 203 has definitely been a catalyst to Indian voters throughout the United States. I think that it should be reauthorized this year, and it will definitely help increase the voting participation of Indians throughout the United States.

Thank you.

Mr. EDWARDS. Well, thank you very much.

[The prepared statement of Ms. Wolfley follows:]

TESTIMONY OF JEANETTE WOLFLEY, GENERAL COUNSEL FOR THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION

Mr. Chairman and members of the Committee, my name is Jeanette Wolfley and I am general counsel to the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, located in southeastern Idaho. I welcome the opportunity to present our views on the reauthorization of Section 203 of the Voting Rights Act of 1965, as amended, which provides for language assistance in certain elections.

The Shoshone-Bannock Tribes urge an extension of Section 203 for another 15 years. In addition, we support an amendment for Indian language speakers. This amendment would provide language assistance coverage to Indian lands where 5% of an Indian reservation is non-Indian speaking in the same native language. The amendment is particularly relevant to the Fort Hall Indian Reservation because the Reservation is split into four counties which cracks the Indian population. Currently, over 60% of the Shoshone-Bannock Tribal members speak the Shoshone language, yet under the existing language assistance formula the Shoshone-Bannock peoples are not covered under Section 203 of the Voting Rights Act.

To aid in this reauthorization process, my testimony will discuss the history of voting discrimination against American Indians in this country, and the ongoing struggle of American Indians to gain the right to vote and have a meaningful opportunity to fully participate in the

BEST COPY AVAILABLE

political process. I have attached to my testimony and herein incorporate the law review article entitled, "Jim Crow, Indian Style: The Disenfranchisement of Native Americans".

American Indians' struggle in the democratic process has a unique and complex history which mirrors their long relationship with the federal government. As eloquently stated by Felix Cohen, "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[1] The history of Indian disenfranchisement illustrates the panoply of shifting majority attitudes, policies and laws toward Indians.

For over 500 years, the American Indian has posed a challenge to the white society. The right to be Indian and to continue to be a part of a tribal community suggest the right to be different than the mainstream America. This rights runs counter to the traditional drive of the dominant society. The United States offers equal opportunities to all persons, but in practice, the opportunities imply a goal of sameness. American Indians have clung to what seems best for them and have instinctively resisted imposed measures by non-Indian society designed to make them give up their traditions and culture. The United States has labeled this Indian resistence the "Indian problem".

---

[1] Felix Cohen, The Erosion of Indian Rights, 62 Yale, L.J. 348, 390 (1953).

Beginning in the 1800's, the federal government determined that what was best for American Indians was to thoroughly assimilate into white society. Many years earlier, the United Stated adopted the ethnocentristic view that Indian culture was "inferior", "savage", and "uncivilized", and would not survive in the European influenced society. Accordingly, the federal government utilized the devise of citizenship to induce Indians to integrate into the mainstream white majority society. To assist in ths citizenship effort, the federal government undertook efforts to reduce Indian landholdings by removing Indians from their aboriginal areas to much smaller areas of land known as reservations. Individual Indians were persuaded to adopt the lifestyle of European farmers and abandon their tribal ties and culture.

The naturalization and citizenship process was not readily accepted by the majority of American Indians. Most Indians remained loyal to their tribal ways and government. Many did not understand why they had to abandon their tribal ties and adopt the white ways, and why United States citizenship was made contingent upon Indians accepting removal, allotments of their land, and certain treaty provisions.

Some Indians, however, sought to participate in politics by casting their ballot. The local officials rejected their ballots which resulted in one of the first Indian voting cases, Elk v. Wilkins, 112 U.S. (1884). In this Supreme Court case, Mr. Elk had severed his ties with the Omaha Tribe and was a respectable farmer. The local officials, however, still viewed him as an Indian and denied him the right to vote. The Supreme Court agreed, and reasoned that Mr. Elk was not a United States citizen under the fourteenth amendment, nor did he fit within the protections of the fifteenth amendment. Elk, 112 U.S. at 99.

The justification for prohibiting Indians from exercising their right to vote can be divided into five categories: (1) failure to sever tribal ties makes Indians ineligible; (2) Indians not taxed; (3) Indians are under guardianship; (4) reservation Indians are not residents of the states; and (5) tribal sovereignty precludes participation in state and local governments. Categories (1), (2), (3) and (4) have been repealed by state legislatures or state laws have been struck down by the courts. The tribal sovereignty argument justifying the prohibition against Indian voting has appeared in recent litigation. The argument used by states is that Indians do not care or wish to participate in state or county affairs, and instead, rely on the tribal and federal government for certain services and political participation. Therefore, states maintain tribal sovereignty, rather than discrimination, explains the state government's treatment of Indians and also the diminished participation of Indians in state and local political activities.

In Windy Boy v. County of Big Horn,[2] the Montana federal district court rejected the tribal sovereignty position. The court stated:

> The Court does not find that dual sovereignty explains the inability of Indians to participate fully in the political processes...Racially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government.[3]

The court decided overwhelmingly in favor of the Indian plaintiffs and ordered that the county and school district be redistricted into single-member districts.

The majority of blatant legislation and local actions which denied the franchise to Indians have been successfully challenged. Following the enactment of the Voting Rights Act of 1965, there has been a steady increase in the number of Indians voting. Indians are seeking election to local school boards and state government positions. The result is a greater awareness among Indians of their voting rights and the significant influence they can have on local, state and county elections.

---

[2] 647 F. Supp. 1002 (D. Mont. 1986). In Windy Boy, Crow and Northern Cheyenne tribal members challenged the Big Horn County and school district's at-large election scheme as violative of Section 2 of the Voting Rights Act. The Indian plaintiffs presented extensive evidence of past and continuing discrimination or polarization in voting, public accommodations, employment, police protection, housing, churches, etc.

[3] Id. at 1021.

In 1986, the National Indian Youth Council issued a report which showed there were 852 Indians holding a non-tribal elected office.[4] Of the officeholders, more than 90% were serving on school boards, 49 were serving in state-local positions, and one served in Congress.[5]

A consequence of this Indian political action and success in the election of Indian candidates is a marked increase in voting rights litigation. Indians are challenging state-devised election schemes and systems which submerge Indian voting strength or deny equal and effective participation in the political process. The primary tool utilized by Indian voters to assert and protect their fundamental constitutional rights is the Voting Rights Act.

In the 1980's, Indian plaintiffs have successfully brought lawsuits under the Voting Rights Act in the states of New Mexico, Arizona, Colorado, South Dakota, Montana, Alaska, North Carolina and New York. As recently as two years ago, Indian voters from the Ute Mountain Reservation in Colorado were covertly discriminated against by a multi-member voting district scheme, and were required to seek adjudication of a right long recognized a fundamental personal right.

---

[4] National Indian Youth Council, Indian Elected Officials Directory (Nov. 1986).

[5] Id. The sole Congressman is Ben Nighthorse Campbell, a Northern Cheyenne, residing in Colorado.

The resistence by states and local entities to Indian participation in virtually every aspect of the electoral process is evident by the voting rights challenges. For example, in a South Dakota case, a few days prior to the November 1984 general election, a county auditor rejected hundreds of registration cards from an Indian registration drive. One daybefore the general election, the federal court ordered the county officials to permit the Indian to vote. In other cases, Montana and South Dakota county auditors have also limited the number of registration forms given to Indian voter registrars from ten-to-fifteen a piece. The Indian registrars from the Pine Ridge Reservation in South Dakota traveled approximately eighty miles round trip to begin their registration drive.

In 1986, on the Cheyenne River Sioux Reservation school district officials had to be court ordered to establish polling places on a reservation. Prior to the lawsuit, Indian voters were forced to travel up to 150 miles round trip to vote in school board elections. Counties in South Dakota on the Cheyenne River Sioux Reservation, and on the Navajo Reservation in Arizona have also violated the bilingual language provisions of the Voting Rights Act by not providing election information in the Indian language, and not providing bilingual poll workers.

Given Indians' recent intensified fight for an equal voice in politics, Indians will continue to face the enduring legacy of racial discrimination. The Voting Rights

Act, however, is the protective device which will assist Indians in seeking the goal of political equity.

Section 203 of the Voting Rights Act is one of the primary provisions which has assisted numerous Indian individuals in the elective process. Language barriers to Indians in elections is a still present problem. Such language disabilities deter Indian participation in elections. Even though Indians may register to vote through registration drives conducted by tribal members on the reservation, there is no guarantee that they may vote if there is not an interpreter at the polling place. Only a few Indian tribes which speak their native language are covered under Sec. 203.

For example, the Shoshone-Bannock Tribes are not covered under Section 203 of the Voting Rights Act. On the Fort Hall Reservation, approximately 60% of the population are native speakers of Shoshone. Of this 60%, about 25% require oral interpreters at the polling place.

At all Shoshone-Bannock Tribal elections, interpreters are provided along with the election clerks. This assistance is very important to elders and second language speakers. Clerks are used extensively by the elders.

The importance of providing Shoshone interpreters is necessitated by the fact that the Shoshone and Bannock languages are not written languages. At Tribal meetings, campaigns, etc., interpreters are present and translate the speeches to the Tribal membership.

Native speakers of Shoshone and Bannock state the English language is too broad and general. The Indian language is more descriptive and vivid. Tribal members can automatically picture what they are supposed to do at the voting booth when it is explained to them in their language, rather than in English. When the clerks speak in the Shoshone and/or Bannock language to Tribal members, it puts them at ease; the Tribal members feel comfortable in the polling place; and it softens the burden of reading English.

Many Tribal members do not participate in the state and federal elections because of the lack of Indian election clerks and Indian language interpreters which results in the Indian voters feeling unwelcome and uncomfortable. Many Indians do not vote in state elections for fear of not understanding an English word, and not having someone there who can explain it to them in their Indian lanaguage.

In contrast to the low turnout of Indian voters in the state and federal elections, the Tribal elections have a high voter turnout. In the last general election, May 31, 1991, over 60% of the eligible voters cast votes. The majoritiy of voters in the Tribal elections are the elders, who ar also the ones who use interpreters at the polls.

In reauthorization, this Congress would affirm its commitment to diminishing barriers, voting discrimina-tion, and exclusion against citizens whose dominant language is non-English. In keeping with that commitment made in 1975, it is appropriate that the Congress review the history of Indian disenfranchisement and the continuing discrimin-ation in the electoral process that American Indians and Alaska Natives encounter.

JIM CROW, INDIAN STYLE: THE DISENFRANCHISEMENT OF NATIVE AMERICANS

*Jeanette Wolfley**

Introduction

In 1965 Congress enacted the Voting Rights Act, which spurred the black voting rights movement in the South and set the stage for major changes in the national political system. The campaign for equal voting rights spread to Hispanic communities of the rural southwest and urban barrios.[1] Indians have taken the path developed by blacks and Hispanics to seek enforcement of the fifteenth amendment by challenging election schemes and systems devised by towns bordering reservations, counties, and school districts throughout the West and Southwest.[2]

Like black and Hispanic voters, Indians have faced intense, deep-seated resistance and racism from the majority community while attempting to gain and exercise the franchise. The Indians' struggle to participate in the democratic process has a unique and complex history which mirrors their long, cyclic relationship with the federal government. Indeed, the history of Indian disenfranchisement reflects a panoply of shifting majority attitudes, policies, and laws toward Indians.

This article examines the ongoing struggle of Indians to gain the right to vote and, thus, have a meaningful opportunity to fully participate in the political process. It will discuss historical and modern disenfranchisement and the continued progress toward the goal of political equality envisioned by the fifteenth amendment.

© 1990 Jeanette Wolfley

* General Counsel, Shoshone-Bannock Tribes; Former Director of the Voting Rights Project and Staff Attorney, Native American Rights Fund. J.D., 1982, University of New Mexico; B.A., 1979, University of Minnesota. I wish to thank Jacqueline Williams and Vicki Powers for their time and comments on previous drafts of this article.

[1] *See* Gomez v. City of Watsonville, 852 F.2d 1186 (9th Cir. 1988); Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988).

[2] *See, e.g.*, Windy Boy v. County of Big Horn, 647 F. Supp. 1002 (D. Mont. 1986) (lawsuit by Crow and Northern Cheyenne against at-large elections in Montana); Buckanaga v. Sisseton Indep. School Dist., 804 F.2d 469 (8th Cir. 1985) (challenge by Sisseton-Wahpeton Sioux to at-large school district in South Dakota); Sanchez v. King, 550 F. Supp. 13 (D.N.M. 1982), *aff'd*, 459 U.S. 801 (1983) (Navajo and Pueblo voters' action against reapportionment plan of New Mexico).

Imposition of Naturalization and Citizenship

In the past 200 years, federal Indian policy has been a product of tension between two conflicting responses to the "Indian problem"—separation and assimilation. One federal policy coerced Indians to adopt and integrate into the mainstream white majority, while another obstructed their participation in the growing American society. The struggle over Indian voting rights illustrates these two policies.

Naturalization and citizenship laws were major mechanisms to facilitate federal efforts to assimilate Indians, obtain Indian lands, and terminate tribal governments. From 1854 to 1924, naturalization and citizenship were the primary devices used to induce assimilation. As this article will show, these federal efforts were not readily accepted by the majority society and Indians.[3]

The common objectives of the majoritys' views stemmed from the principles articulated by Chief Justice Marshall in his three landmark opinions, known as the Marshall Trilogy: *Johnson v. M'Intosh*,[4] *Cherokee Nation v. Georgia*,[5] and *Worcester v. Georgia*.[6] These cases treated Indian tribes as distinct, independent political communities. As seen below, this treatment has since raised questions of dual citizenship, wardship, and competency.

---

[3] *See, e.g.*, *In re* Heft, 197 U.S. 488, 499-502 (1905), *overruled sub nom.* United States v. Nice, 241 U.S. 591 (1916).

[4] 21 U.S. (8 Wheat.) 543 (1823). In this decision, the Court held as invalid tribal conveyance of land to private individuals. The Court reasoned that Indians retained a right of occupancy extinguishable by discovering European sovereigns. The result was a recognition of a legal right of Indians in their lands valid against all parties save the federal government.

[5] 30 U.S. (5 Pet.) 9 (1831). *Cherokee Nation* expanded the recognition of Indian sovereignty set forth in *Johnson v. M'Intosh*. Georgia attempted to impose its laws on the Cherokees in violation of treaty provisions. To stop such intrusions, the Cherokee filed suit in the Supreme Court under article III, section 2 of the United States Constitution—a section which gives the Supreme Court original jurisdiction in cases and controversies involving states and foreign nations. *Id.* at 7-14. The key issue before the Court was whether the Cherokees constituted a "foreign nation" in the Constitutional sense. Chief Justice Marshall determined that they did not. However, Marshall determined that the tribe was a state in the international sense; it was "a distinct political society separated from others, capable of managing its own affairs and governing itself." *Id.* at 16. Marshall noted that the tribe was "in a state of pupilage," and "their relations with the United States resembles that of a ward to his guardian." *Id.* at 17.

[6] 31 U.S. (6 Pet.) 515, 528 (1832). The following term, Justice Marshall addressed the unresolved issue of state jurisdiction over Indian tribes. Georgia attempted to prevent non-Indians from living on Cherokee lands without permission of the State's Governor. In a strongly-worded opinion, Marshall struck down the application of Georgia law to Cherokee lands, stating: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Id.* at 561. Marshall's opinion is the foundation of law excluding a states' law from Indian Country.

Naturalization

In Marshall's understanding, Indian tribes possessed a sovereignty as complete as that of any European nation. After forming political alliances through treaties with the United States, tribes surrendered their sovereignty but remained sovereigns in the sense the term has been used since the early nineteenth century.[7] Prior to the General Allotment Act of 1887,[8] most Indians were considered members of separate political communities and not part of the state politic or the United States.[9] The term "sovereign" is used to describe the status of tribal governments, and it is acknowledged by the United States Supreme Court as a fundamental of modern federal law.[10]

Despite the Marshall Trilogy, the settlers' demand for Indian lands increased rapidly and forced politicians to develop a policy of removal. West of the Mississippi River lay vast amounts of presumably unoccupied lands; by pushing Indians beyond the river settlers would possess the land.

The popularity of removal was so strong that the federal government embarked on a campaign of negotiating removal treaties even before President Andrew Jackson signed the Indian Removal Act of 1830.[11] Removal was more than an assault on

---

[7] Tribal sovereignty as recognized in *Worcester* is best described by Felix Cohen:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possess, in the first instance, all the powers of any sovereign state, (2) Conquest renders the tribe subject to legislative power of the United States, and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not, by itself, affect the internal sovereignty of the tribe, i.e., its power of local self-government, (3) these powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942 ed.

[8] See *infra* note 56 and accompanying text.

[9] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); The Kansas Indians 72 U.S. (5 Wall.) 737 (1866); United States v. Kagama, 118 U.S. 375 (1886).

[10] In modern times, the Supreme Court has held that tribal governments are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978).

[11] Ch. 148, 4 Stat. 411 (current version of §§ 7-8 at 25 U.S.C. § 174 (1988)). The Act authorized President Jackson to exchange territory west of the Mississippi River for the lands of eastern tribes. For further discussion, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 78-92 (1982 ed.).

Indians; many believed that the removal policy was the only means of saving Indians from extermination. Removal eventually served to promote assimilation, albeit assimilation by separation.

In conjunction with removal, the federal government created the reservation, a strategy which sought to change Indian tribes politically, socially, and economically.[12] Instead of their traditional tribal leadership, most tribal members found themselves subject to the authority of white agents from the Bureau of Indian Affairs (BIA). However, many reformers saw the reservations as cultural failures; others as economic failures or obstacles to progress. For example, railroads were accelerating their demand for Indian lands and cattle ranchers made similar demands.

With the reservation policy clearly not working, reformers abandoned it and launched a triple assault on Indian sovereignty: the creation of a federal school system for Native Americans,[13] the extension of federal laws to Indians,[14] and the allotment of tribal lands.[15]

By splintering the reservations and distributing the land in allotments to individual Indians, the reformers hoped to destroy tribal economic power and assimilate Indians to European-American commercial values. It was intended that when tribal economic power was eliminated, tribal political power would also wane; the reformers would then grant United States citizenship to allotted Indians. Thus, federal supervision of Indians would become unnecessary. The reformers believed economic self-sufficiency, legal subjugation, and assimilation was the solution to the "Indian problem."

Most reformers agreed that assimilation was the ultimate solution, and a structured education, an allotment policy, and United States citizenship were the most effective ways to bring it about. Some reformers wanted assimilation immediately: railroads, oil companies, homesteaders and cattle ranchers demanded immediate placement of Indian children in schools, award of citizenship, and allotment of tribal land. Other reformers insisted on a more gradual approach that emphasized citizenship and allotment only when an Indian was culturally prepared for both. Between 1880 and 1934, policy toward Indians vacillated between these extremes.

---

[12] *See* ch. 85, 3 Stat. 516 (1819) (current version of § 1 at 25 U.S.C. § 271 (1988)).

[13] Education for Indians was provided by mission schools in the early days. Beginning in the late 1870s, off-reservation boarding schools were established. In the eyes of reformists, off-reservation boarding schools were the ideal method of assimilation because Indian youth were removed from their families. *See* Special Subcomm. on Indian Education, A National Tragedy—A National Challenge, S. Rep. No. 501, 91st Cong., 1st Sess. 140-52 (1969).

[14] *See* F. Prucha, American Indian Policy In Crisis 328-41 (1976).

[15] See *infra* text accompanying notes 16-17, 44-50, & 57-60.

Congressional efforts to naturalize entire tribes generally fell short of their intended goal. For example, from 1839 to 1850, the Stockbridge-Munsee, Brotherton, and Wyandot Indians were plagued with incessant congressional efforts to make them citizens.[16] In other congressional attempts, citizenship was made dependent upon the acceptance of an allotment of land; the alternative to accepting an allotment was removal from native lands.[17]

Indians who were not granted citizenship by congressional action were barred from the naturalization process open to European immigrants; Indians were regarded as domestic subjects or nationals.[18] This concept of Indian status was reiterated by United States Attorney General Caleb Cushing in 1856:[19]

> The fact, therefore, that Indians are born in the country does not make them citizens of the United States. The simple truth is plain, that Indians are subjects of the United States, and therefore are not, in mere right of home-birth, citizens of the United States.
>
> . . . .
>
> But they cannot become citizens by naturalization under existing general acts of Congress. Those acts apply to foreigners, subjects of another allegiance. The Indians are not foreigners, and they are in our allegiance, without being citizens of the United States. Moreover, those acts only apply to "white" men.

---

[16] *See* Act of Mar. 3, 1839, ch. 83, 5 Stat. 349, 351 (Brotherton); Act of Mar. 3, 1843, ch. 101, § 7, 5 Stat. 645, 647 (Stockbridge); Act of August 6, 1846, ch. 85, 9 Stat. 55 (Stockbridge); Treaty with the Senecas [and Others], Feb. 23, 1867, art. 13, 15 Stat. 513, 516 (tribal signatories included the Senecas, Shawnees, Quapaws, and Wyandots). Article 13 of the treaty with the Senecas prohibited tribal membership to Wyandots who had consented to United States citizenship under a prior treaty unless they were found "unfit for the responsibilities of citizenship." *Id.*

[17] *See* Treaty with the Pottawatomie Indians, Feb. 27, 1867, United States-Pottawatomies, art. 6, 15 Stat. 531, 531-33; Treaty with the Sioux Indians, Apr. 29, 1868, United States-Sioux, art. 6, 15 Stat. 635, 637; Treaty with the Choctaws, Sept. 27, 1830, United States-Choctaws, arts. 14, 16, 7 Stat. 333, 335-36.

[18] *See In re* Camille, 6 Fed. 256 (C. Or. 1880); *In re* Burton, 1 Alaska 111 (D. Alaska 1900). *Camille* is a prime example of the deep-seated racism held by many whites, and certainly by the judiciary, against nonwhite persons in the late 1800s.

[19] 7 Op. Att'y Gen. 746 (1856).

> . . . .
>
> Indians, of course, can be made citizens of the United States only by some competent act of the General Government, either a treaty or an act of Congress.[20]

In the early citizenship case of *Scott v. Sanford*[21] (the Dred Scott Case), the Supreme Court held that a black person could not become a citizen under the Constitution.[22] The Supreme Court stated, in dictum, that Indians were not citizens, in the constitutional sense, but that Congress had the power to naturalize Indians.[23] Thus, the Dred Scott Case effectively concluded that Indians who were unable to prove they were born under United States jurisdiction[24] were precluded from registering to vote.

Although Congress did eventually naturalize all Indians, before the Reconstruction Era[25] the general naturalization laws were restricted to European immigrants and did not include native-born Indians.[26] In 1868, section 1 of the fourteenth amendment defined citizenship as "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."[27]

---

[20] *Id.* at 749-50.

[21] 60 U.S. (19 How.) 393 (1857).

[22] *Id.* at 403-04. This notorious decision was legislatively overridden by the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

[23] *Scott*, 60 U.S. (19 How.) at 403-04.

[24] See *infra* note 29 and accompanying text.

[25] After the Civil War, the First Reconstruction Act of 1867 mandated that the Confederate States, in order to reenter the Union, had to adopt new constitutions guaranteeing male suffrage without regard to race. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428. Subsequently, Congress adopted the fifteenth amendment in 1870, which guarantees the right to vote irrespective of "race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

[26] *See* Act of Apr. 14, 1802, ch. 28, 2 Stat. 153. Indians born in Canada, Mexico, or other foreign countries did not become eligible for citizenship until the adoption of the Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1137, 1140, *superseded by* Act of June 27, 1952, ch. 477, § 301, 66 Stat. 163, 235 (codified at 8 U.S.C. § 1401 (1952)), because the Citizenship Act of 1924 referred only to "Indians born within the territorial limits of the United States." Act of June 2, 1924, ch. 233, 43 Stat. 253, 253. *See* Morrison v. California, 291 U.S. 82, 95 n.5 (1934).

[27] U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Following passage of the amendment, some erroneously thought Indians automatically qualified for United States citizenship because of the phrase "all persons," and because Indians were not explicitly excluded. This dispute prompted the Senate to instruct the Senate Judiciary Committee to inquire into the status of Indians under the amendment.[28]

In December, 1870, the Senate Judiciary Committee reported that Indians who maintained their tribal relations were not citizens under the fourteenth amendment. Therefore, they could not be said to have been born under the complete jurisdiction of the United States.[29] The Committee had the view that citizenship was incompatible with continued participation in tribal government or tribal property. That is, citizenship required affirmative consent to jurisdiction of the United States. The report stated:

> To maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, and to which they were neither requested nor permitted to assent, to annual treaties then existing between the United States as one party, and the Indian tribes as the other parties respectively, would be to charge upon the United States repudiation of national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce their just rights, and were enjoying the voluntarily assumed guardianship and protection of this Government.[30]

One year later, an Oregon district court agreed with the Judiciary Committee and held that Indians born in tribal allegiance were not persons born in the United States and thus subject to its jurisdiction.[31] The court stated:

> To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience. . . . But the Indian tribes within the limits of the United States have always been held to be distinct

---

[28] CONG. GLOBE, 41st Cong., 2d Sess. 2479 (1870) (text of the resolution of inquiry).

[29] SEN. REP. No. 268, 41st Cong., 3d Sess. 1-11 (1870).

[30] *Id.* at 11.

[31] McKay v. Campbell, 16 F. Cas. 161 (D. Or. 1871) (No. 8840).

82

> and independent political communities, retaining the right of self-government, though subject to the protecting power of the United States.[32]

This position was sustained by a subsequent United States Supreme Court naturalization case, *Elk v. Wilkins*.[33]

Elk represents a torturous interpretation of state statutes and constitutional amendments in order to prevent Indians from voting. John Elk left his tribe and resided in Omaha, Nebraska. He attempted to exercise his right to vote in Nebraska. The Court, in upholding the denial of his right to vote, reasoned that he was not an American citizen because his intent to become a citizen required a positive and specific response from the United States before it could affect his status as a citizen.[34]

The Court further concluded that the fifteenth amendment did not apply to Elk, nor was he a United States citizen because he did not owe allegiance to the United States.[35] A final reason for denying the right to Elk was that the United States had entered into treaties and enacted statutes (before and after the fourteenth amendment) naturalizing particular tribes and portions of tribes.[36] Therefore, the federal government had other legislative means of naturalizing Indians.

The majority opinion chose to disregard that Elk had severed relations with his tribe.[37] The Court construed section 1 of the fourteenth amendment as requiring a person deemed a citizen by *birth* to be subject to the ordinary jurisdiction of the United States at the time of birth.[38] Since Elk was born to a tribal member who lived on tribal land, he was not a citizen by birth.

---

[32] *Id.* at 165-66.

[33] 112 U.S. 94 (1884).

[34] *Elk*, 112 U.S. at 109.

[35] *Id.* at 99. The Court also relied on the fourteenth amendment phraseology, "Indians not taxed," to deny the franchise to Elk. Section 2 of the fourteenth amendment provides: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole numbers of persons in each state, *excluding Indians not taxed*." U.S. CONST. amend. XIV, § 2 (emphasis added). A similar provision is found elsewhere in the Constitution. *Id.* art. I, § 2, cl. 3. In 1926, when § 1 was codified, the phrase "Indians not taxed" was deleted. *See* 8 U.S.C. § 1 (1926).

[36] *Elk*, 112 U.S. at 108-09.

[37] Elk lived outside Indian Country within Nebraska and was subject to state and federal taxation.

[38] *Id. See also* United States v. Osborn, 2 F. 58 (D. Or. 1880). For a study of the effects of tribal membership on citizenship, see Katzenmeyer v. United States, 225 F. 501, 523 (7th Cir. 1915).

The *Elk* dissenting opinion by Judge Harlan is better reasoned.[39] The dissent points out that the legislative history of the fourteenth amendment demonstrates the drafters understood those Indians, such as Elk, who were considered citizens pursuant to section 1.[40] The dissent further argued that prior to the fourteenth amendment Congress had granted citizenship to many Indians who abandoned their tribal ties.[41] The dissent also noted that the 1870 Senate Judiciary Committee report supported Indian citizenship under the fourteenth amendment, and that

> the report closes with this significant language: "It is pertinent to say, in concluding this report, that treaty relations can properly exist with Indian tribes or Nations only, and that *when the members of any Indian tribe are scattered, they are merged in the mass of our people and become equally subject to the jurisdiction of the United States.*"[42]

To the advocates of immediate citizenship, the *Elk* decision was an outrage.[43] An English-speaking farmer and family man, Elk was acculturated to European-American society and was certainly deserving of citizenship. Something had to be done, and the advocates for gradual citizenship were pressured into merging the question of Indian citizenship with their drive for the allotment of tribal lands.

Following *Elk*, the legal status of Indians represented a state unknown to civil law: Indians were neither citizens nor aliens; they were not white under the naturalization laws, or slaves, or persons in a previous condition of servitude.[44] Barring special acts, treaties, or a constitutional amendment, many Indians appeared to exist in a legal vacuum.

Indian Citizenship

Although John Elk was never naturalized, thousands of Indians were naturalized from the mid-1850s through the early

---

[39] *Elk*, 112 U.S. at 112-19 (Harlan, J., dissenting).

[40] *Id*. at 117-18. Si [illegible] the majority ignored the legislative history.

[41] *Id*. at 115-16.

[42] *Id*. at 119.

[43] In an Asian-American naturalization case, United States v. Wong Kim Ark, 169 U.S. 649 (1898), the Supreme Court again found that Indians were not citizens. The Court excepted from its theory of citizenship by birth "members of Indian tribes of which owed immediate allegiance to their several tribes and were not part of the people of the United States . . . ." *Id*. at 662 (dictum).

[44] The status of Indians was overshadowed at the end of the Civil War by the discussion and efforts for blacks to gain freedom, citizenship, and economic conditions equal to whites.

1900s. By accepting allotments and leaving the reservation or tribal society, Indians were rewarded with citizenship. By 1924, nearly two-thirds of all Indians were granted citizenship by treaties or special and general statutes.[45]

Treaties and Special Acts

The southeastern tribes were the first to receive citizenship through their treaties with the United States.[46] In some treaties, citizenship was dependent on acceptance of an allotment of land in severalty.[47] Indeed, in *Elk*, the Court identified twelve treaties, four statutes, four judicial opinions, and eight attorney general opinions that required "proof of fitness for civilization" before an Indian could obtain citizenship and the right to vote.[48]

Many tribes were naturalized by special statute. In the cases of the Stockbridge and Brotherton Tribes of Wisconsin, the tribes were dissolved and land distributed to the members. Once allotment was complete, the Indians became citizens.[49] Citizenship was also premised on the requirements that Indians adopt the habits of "civilized life": learn to read and speak English.[50] Another general act granted citizenship to Indian women who married white men.[51]

In 1890, as an enticement to members of the Five Civilized Tribes[52] to abandon their tribal relations, Congress passed the Indian Territory Naturalization Act.[53] The Act provided

---

[45] *See* D. McCool, Indian Voting 106 (1985).

[46] Treaty with the Cherokees, July 8, 1817, United States-Cherokees, art. 8, 7 Stat. 156, 159; Treaty with the Cherokees, Feb. 27, 1819, United States-Cherokees, art. 2, 7 Stat. 195, 196; Treaty with the Choctaws, Sept. 27, 1830, United States-Choctaws, art. 14, 7 Stat. 333, 335. *See* F. Cohen, *supra* note 8, at 153 nn. 6-10, for treaties conferring citizenship on tribes and individual Indians.

[47] *See* Treaty with the Kickapoos, June 28, 1862, art. 3, 13 Stat. 623, 624; Treaty with the Senecas [and Others], Feb. 23, 1867, art. 13, 15 Stat. 513, 516 (treaty between the United States and the Senecas, Shawnees, Quapaws, Wyandots and others).

[48] *Elk*, 112 U.S. at 100.

[49] *See* Act of Mar. 3, 1839, ch. 83, 5 Stat. 349, 351 (Brotherton); Act of Mar. 3, 1843, ch. 101, § 7, 5 Stat. 645, 647 (Stockbridge).

[50] Act of Mar. 3, 1865, § 4, 13 Stat. 541, 562. *See* Oakes v. United States, 172 F. 305 (8th Cir. 1909).

[51] Act of Aug. 9, 1888, ch. 818, 25 Stat. 392.

[52] The Seminole, Choctaw, Chickasaw, Cherokee, and Creek Nations.

[53] Act of May 2, 1890, § 43, 26 Stat. 81, 99-100. The Five Civilized Tribes opposed the grant of federal citizenship to their people because they feared it would terminate their tribal government. *See* S. Misc. Doc. No. 7, 45th Cong., 2d Sess. (Dec. 1877) (vol. I). Significantly, the Five Civilized Tribes were excluded from the General Allotment Act of 1887, §§ 6, 8, 24 Stat. 388, 390-91.

> [t]hat any member of any Indian tribe or nation residing in the Indian Territory may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application as provided . . . [t]hat the Indians who become citizens of the United States under provisions of this Act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong.[54]

The Act is similar to statutes enacted for specific tribes.[55] Also, more than any other federal legislation, it implies that Indians hold dual citizenship. However, it also reaffirms the potential incompatibility between tribal membership and United States citizenship.

The Allotment Period

In 1887, Congress passed the most disastrous Indian legislation in United States history: the General Allotment Act of 1887 (GAA).[56] The GAA had dual goals of opening Indian lands for white settlement[57] and assimilating Indians into mainstream society.[58]

Assimilation was accomplished by imposing citizenship upon two classes of Indians: (1) those to whom allotments were made by the GAA, or any law or treaty, and (2) those who voluntarily lived apart from their tribes and "adopted the habits of civilized life."[59] Under the first instance, citizenship was automatic at the

---

[54] Act of May 2, 1890, § 43, 26 Stat. 81, 99-100.

[55] *See, e.g.*, Act of July 15, 1870, § 10, 16 Stat. 335, 361-63. Under this act, a Minnesota Winnebago could apply to the federal district court for citizenship. *See also* Act of Mar. 3, 1873, § 3, 17 Stat. 631, 632.

[56] Ch. 199, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-34, 339, 341-42, 348 (1982)) [hereinafter GAA]. This legislation is also known as Dawes Severalty Act or the Dawes Act.

[57] "[T]he most powerful force motivating the allotment policy was the pressure of land-hungry western settlers." *History of the Allotment Policy: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 23d Cong., 2d Sess. 9 (1934) (statement of D. Otis), *quoted in* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 71 (1979)).

[58] Representative Skinner, House sponsor of the GAA, said that "tribal relations must be broken up" and the "example of the white people" would provide a model for the Indians. 18 CONG. REC. 190-91 (1886).

[59] GAA, ch. 119, § 6, 24 Stat. 388, 390. Section 6 provided:

> Every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act,

end of the twenty-five year period in which the allotment was held in trust by the Secretary of Interior. However, some tribes had their period of trust status extended by legislation or executive order, so it became difficult to determine who was a United States citizen and who was not. This allotment requirement actually meant that citizenship, long recognized as a personal right of an individual, was really a function of the status of the real estate the Indian might possess.

Citizenship increased rapidly after the passage of the GAA. By 1890, citizenship had been extended to 5,307 Indian allottees, and by 1900, to 53,168.[60] In 1901, Congress awarded citizenship to another 101,506 Indians in Indian Territory, and by 1905 more than half of all Indians had become citizens.[61] President Theodore Roosevelt aptly described the GAA as "a mighty pulverizing engine to break up the mass."[62]

During this allotment period (1887-1901), among many Indians the recognition of United States citizenship became a ceremonial event: It symbolized the Indian casting away traditions and customs and assuming the beliefs and values of the majority society. One citizenship ceremony involved a man "shooting his last arrow" and taking hold of the handles of a plow to demonstrate his intent to become an American citizen.[63] Another ritual involved an Indian woman accepting a workbag and purse to hold money earned from labor and "wisely kept."[64]

Interest in further altering the trust status of Indian land continued. In 1906, Congress amended the GAA by enacting the Burke Act.[65] Under the Burke Act, the twenty-five year trust period was eliminated and an Indian became a citizen upon the issuance of a fee patent. Conveyance of the fee patent was made after the Commission of Indian Affairs determined an allottee

---

> or under any law or treaty, . . . is hereby declared to be a citizen of the United States and entitled to all the rights, privileges, and immunities of such citizen.

GAA, § 6.

[60] J. OLSON & R. WILSON, NATIVE AMERICANS IN THE TWENTIETH CENTURY 73 (1984) [hereinafter OLSON & WILSON].

[61] *Id.*

[62] 35 CONG. REC. 90 (1901) (message by President Theodore Roosevelt).

[63] V. DELORIA, JR., OF UTMOST GOOD FAITH 142-43 (1971).

[64] *Id.* at 143.

[65] Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1988)). The Act was named after its sponsor, Congressman Charles Burke of South Dakota.

was "competent and capable of managing his or her affairs. . . ."[66] Again, the granting of citizenship was made dependent on severance of tribal ties.[67]

The Post-Allotment Period

Prior to World War I, Woodrow Wilson's Secretary of Interior, Franklin K. Lane, identified the political potential of the Indian voter, particularly in the Dakotas, Arizona, New Mexico, Montana, Oklahoma, and other states with relatively large numbers of Indians.[68] Secretary Lane urged the Democratic Party to seek to register Indian voters for the 1916 national election. Most whites in the western states were, however, quite hostile to the idea of Indians as voters, even though Indians would have been participating only in federal elections.[69] In addition, both the Harding and Coolidge Administrations were cognizant of the political potential of the Indian voter and moved toward increasing Indian participation in the political decision-making process by seeking Indian involvement in the Republican Party.[70]

Meanwhile, during World War I Congress had again attempted to resolve the issue of Indian citizenship. After the United States entered the war, thousands of Indians volunteered for the armed forces and for support work in the states. Ironically, these volunteers included individuals whose tribes had been fighting the United States Army as recently as thirty-five years earlier.[71] As a result of the Indian response, it became apparent to the federal government that it would finally have to respond to the ambiguity of the legal status of Indians.[72] In

---

[66] 25 U.S.C. § 349 (1988).

[67] *See* United States v. Debell, 227 F. 760 (D.S.D. 1915).

[68] *See* F. Svensson, The Ethnics in American Politics: American Indians 24-25 (1973).

[69] *Id.* at 25.

[70] *Id.*

[71] *Id.* The Iroquois League, in an effort to reassert its autonomy and independence as a nation, formally declared war on Germany in 1917, separately from the United States and claimed status as one of the Allied Nations. Additionally, during the citizenship debates of the early 1920s, the Iroquois protected any attempts to grant them citizenship and declared that they would not accept citizenship if Congress granted it in the future.

[72] In 1918, it was reported that the Indian population was 336,000. Though less than 10% were military age, more than 7,000 served in the armed forces. Also at that time only 30% of all Indians could read and write English and less than half were citizens. Peterson, *Native American Political Participation*, Annals, May 1957, at 116, 123.

1919, Congress declared that all Indians who had served in the armed forces and received honorable discharges would be granted American citizenship upon application.[73]

Yet again, the citizenship question was caught up in a conflict of responses among the majority society. Some favored citizenship on moral grounds, while others viewed citizenship as the final step to integrating Indians into the main society. Congressmen such as Edgard Howard of Nebraska and Gale Stalker of New York, were interested in ending the trust status of Indian lands and advocated blanket immediate citizenship.[74] Stalker and Howard introduced citizenship bills in 1923[75] which encountered immediate hostility from factions who favored gradual assimilation and preservation of Indian lands and Indians who wanted to retain their tribal status.[76]

The Indian Citizenship Act of 1924

Out of these conflicting points of view came compromise legislation. In 1924, Congressman Homer P. Snyder of New York introduced House Resolution 6355, authorizing the Secretary of the Interior to grant citizenship to all Indians who requested it, if they were "individually prepared" for the responsibilities.[77] In addition, the Senate Committee on Indian Affairs proposed a blanket immediate citizenship law,[78] which was opposed by full-blood Indians and whites who were skeptical about rapid assimilation. Finally, out of Congress emerged the Indian Citizenship Act,[79] which states

> [t]hat all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided that the granting of such citizenship shall not in any manner impair or otherwise affect the right of an Indian to tribal or other property.[80]

---

[73] *See* Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.

[74] OLSON & WILSON, *supra* note 60, at 84.

[75] *Id.*

[76] *Id.* at 85.

[77] *Id.*

[78] *Id.*

[79] Act of June 2, 1924, ch. 233, 43 Stat. 253. The Act's drafter was Charles B. Curtis, a Kaw Indian from Oklahoma, who served in the United States House of Representatives (1893-1906), and the United States Senate (1907-13; 1913-1929). Curtis served as U.S. vice president under Herbert Hoover from 1929-1933.

[80] *Id.* The substance of this Act was incorporated into the Nationality Act of Oct. 14, 1949, ch. 876, § 201, 54 Stat. 1137, 1138 (formerly codified at 8 U.S.C. § 601 (1940)). It was superseded in 1952 by the Act of June 27, 1952, ch. 477, § 301, 66 Stat. 163, 235 (codified as amended at 8 U.S.C. § 1401 (1952)).

The Indian Citizenship Act effectively ended the relationship between citizenship and tribal affiliation or federal protection.[81]

The question of citizenship is a complex one for Indians. Many Indians either had no interest in it or else actively sought to reject it. Some have challenged citizenship by refusing to vote in federal and state elections or denying their United States citizenship and strongly asserting tribal sovereignty. Also, tribes have issued tribal passports in place of United States passports.[82]

The Justification by States in Denying Indians the Franchise

An important premise flowing from the United States Constitution is that no one is *granted* the right to vote. Rather, the fifteenth amendment states that no citizen's right to vote shall be "denied or abridged by the United States or any state on account of race, color, or previous condition of servitude."[83] A second implication of the Constitution is that franchise is almost entirely a state matter; that is, states shall prescribe "the times, places and manner" of holding elections.[84] Thus, states had the control over whether Indians could exercise their franchise.

Although Indians were granted United States citizenship in 1924, state doubts were not appeased. Most states continued to refuse to recognize Indians as citizens of the state in which they resided. Other states' officials devised laws to limit Indians' access to the ballot box. The unwillingness of states to allow Indians to vote was no surprise given the history of conflict and antagonism between Indian tribes and states. The often-quoted language of the Supreme Court in 1886 summed up the tribal-state political relationship: "They [tribes] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the United States where they are found are often their deadliest enemies."[85]

---

[81] Opponents of Indian rights continue to question the dual status of Indians. *See infra* notes 83-163 and accompanying text. The courts, however, have held the Act neither affected the trust relationship nor conditioned it upon the severance of tribal ties. *See* United States v. Wright, 53 F.2d 300, 306 (4th Cir. 1931), *cert. denied*, 285 U.S. (1932); United States v. Nice, 241 U.S. 591 (1916); Bowling v. United States, 233 U.S. 528 (1914); Hallowell v. United States, 221 U.S. 317 (1911).

[82] *See* F. SVENSSON, *supra* note 68, at 26. Tribal sovereignty and how some Indians regard the state-tribal relationship inhibits full participation in state politics. Some Indians contend that their voting in state elections would be an acknowledgement of state jurisdiction over Indian reservations. *See* U.S. COMM'N ON CIVIL RIGHTS, NATIVE AMERICAN PARTICIPATION IN SOUTH DAKOTA'S POLITICAL SYSTEM 19-21 (1981).

[83] U.S. CONST. amend. XV, § 1.

[84] U.S. CONST. art. 1, § 4.

[85] United States v. Kagama, 118 U.S. 375, 384 (1886).

This hostility is evident still today. As noted in a recent New Mexico Indian voting rights case: "We note an abiding sentiment among the Indians of New Mexico that the state is an enemy of the tribes. In states with a significant number of Indians, there are disputes between tribal and state governments as to their respective spheres of authority. New Mexico is no exception."[86]

States have five basic arguments in justifying the denial of voting rights to Indians: (1) failure to sever tribal ties makes Indians ineligible; (2) "Indians not taxed"; (3) Indians are under guardianship; (4) reservation Indians are not residents; and (5) tribal sovereignty precludes participation in state and local governments.[87]

Failure To Sever Tribal Ties

Abandonment of traditional Indian culture was once a prerequisite for participation in some state politics. The Minnesota Constitution once granted citizenship only to those Indians who had "adopted the language, customs and habits of civilization."[88] South Dakota also prohibited Indians from voting or holding office "while maintaining tribal relations."[89] The constitutions of Idaho and North Dakota contained similar language.[90]

In 1920, the votes of Indians in North Dakota were challenged by opponents. In *Swift v. Leach*,[91] the North Dakata Supreme Court considered whether 273 Indians of the Standing Rock Sioux Tribe were eligible to vote under article 5, section 121 of the North Dakota Constitution.[92] Section 121 provided that:

---

[86] Sanchez v. King, No. 82-0067-M, 2-0084-C, 82-0180-C, 82-0219-JB, 82-0246-JB, slip op. at 27 (D.N.M. Aug. 8, 1984) (Findings of Fact, Conclusions of Law).

[87] These justifications have been categorized as "constitutional ambiguity, political and economic factors, and cultural and racial discrimination." D. McCool, Indian Voting 106 (1985). *See also* M. Price, Law and the American Indian 229-37 (1973). Price analyzed five arguments: severance of tribal relations, lack of state power over Indian conduct, fear of political control shifting of Indian majorities, guardianship, and residency.

[88] Minn. Const. art. VII, § 1, cl. 4 (1857, repealed 1960).

[89] S.D. Codified Laws Ann. § 92 (1929). This law requiring severance of tribal ties remained on the books until 1951.

[90] Idaho Const. art. VI, § 3 (1890, repealed 1950); N.D. Const. art. V, § 121 (1889, repealed 1922).

[91] 45 N.D. 437, 178 N.W. 437 (1920). *Swift* has also been rejected in favor of the proposition that federal guardianship of Indians disqualifies Indians as electors. *See* Porter v. Hall, 34 Ariz. 308, 271 P. 411, 412 (1928).

[92] *Swift*, 178 N.W. at 438.

> Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state one year and in the county six months, and in the precinct ninety days next preceding election, shall be a qualified elector at such election:
>
> . . . .
>
> > . . . Civilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election.[93]

In determining whether the Indians were eligible to vote, the court reviewed testimony of numerous witnesses (superintendents of the local Indian agency, a county judge, and other county officials) who testified that the "trust patent" Indians had severed tribal ties.[94] One superintendent of the Fort Yates Agency testified on behalf of the Indian voters by stating:

> [T]he Indians have ceased to live in bands under a chief; . . .their educational qualifications compare favorably with white people; they marry the same as white people; have fixed abodes, they live as white people; they are competent to handle their own affairs, and their knowledge of English is as good as the average white man; they have severed their tribal relations and adopted the mode of civilized life and are well qualified to become citizens of this state.[95]

In sum, the testimony emphasized that the Sioux voters were loyal to the majority government, rather than their tribe.

The county argued that (1) the Indians were not civilized, (2) they could not sever their tribal ties without federal consent, and (3) they were under guardianship and, thus, ineligible to vote.[96] In rejecting these arguments, the court found that the Indians were electors under section 21 of the state constitution because they had "adopted and observed the habits and mode of life of civilized persons."[97]

---

[93] N.D. CONST. art. V, § 121 (1889, amended 1898 & 1920, repealed 1922).

[94] *Swift*, 178 N.W. at 438-39. The Indians were referred to as "trust patent" Indians because they received allotments of land under the Burke Act but had not yet received fee titles.

[95] *Id.*, 178 N.W. at 439.

[96] *Id.*, 178 N.W. at 440-41.

[97] *Id.*, 178 N.W. at 443. A similar inquiry regarding abandonment of tribal relation occurred in *Osborn*, in which the defendant was charged with selling liquor to

"Indians Not Taxed"

The phrase "Indians not taxed" was frequently used in state constitutions and statutes to exclude Indians from voting, and is found in the U.S. Constitution.[98] It has been utilized as an economic argument that Indians should not be permitted to vote or participate in revenue decisions, i.e., bond elections, because they do not pay taxes.[99] Additionally, some states have maintained that if the state government has no taxing power over an Indian reservation, then Indians should not be able to participate in the election of state officials.

The 1917 decision of the Minnesota Supreme Court in *Opsahl v. Johnson*[100] typifies these views. In *Opsahl*, the court denied members of the Red Lake Chippewa Tribe the right to participate in county elections because the Indians had not "yielded obedience and submission to [Minnesota] laws."[101]

The court reasoned that Minnesota Indians were not subject to taxation as were other state residents.[102] Therefore, the court concluded, it would be inconsistent with the state constitution to allow Indians the right to elect representatives.[103] The court stated:

> It cannot for a moment be considered that the Framers of the Constitution intended to grant the right of suffrage to persons who were under no obligation to obey the laws enacted as a result of such grant. Or, in other words, that those who do not come within the operations of the laws of the state, nevertheless shall have power to make and impose laws upon

---

an Indian. The purchaser-Indian was declared to be under federal supervision even though he had not lived among his Warm Springs Tribe for fifteen years. The federal court found that "an Indian cannot make himself a citizen of the United States without the consent and cooperation of the government." United States v. Osborn, 2 F. 58, 61 (D. Or. 1880).

[98] U.S. Const. art. 1, § 2; *id.* amend. XIV, § 2.

[99] Today, Indians pay a variety of taxes—federal, state and tribal. Indians living on certain Indian reservations also have tax exemptions not generally applicable to non-Indians.

[100] 138 Minn. 42, 163 N.W. 988 (1917).

[101] *Id.*, 163 N.W. at 991.

[102] Quoting the state, the court declared, "The tribal Indian contributes nothing to the state. His property is not subject to taxation, or to the process of its courts. He bears none of the burdens of civilization, and performs none of the duties of the citizens." *Id.*, 163 N.W. at 990.

[103] *Id.*

> others. The idea is repugnant to our form of government. No one should participate in the making of laws he need not obey.[104]

In 1940, five states (Idaho, Maine, Mississippi, New Mexico, and Washington) still prohibited "Indians not taxed" from voting,[105] even though they granted the franchise to whites who were not taxed. These states simply did not want Indians to participate in revenue decisions that they determined imposed financial burdens on non-Indians only.

On January 26, 1938, the Department of the Interior issued an opinion on the denial of the franchise to Indians.[106] The solicitor concluded:

> I am of the opinion that the Fifteenth Amendment clearly prohibits any denial of the right to vote to Indians under circumstances in which non-Indians would be permitted to vote. The laws of Idaho, New Mexico and Washington which would exclude Indians not taxed from voting, in effect exclude citizens of one race from voting on grounds which are not applied to citizens of other races. For this reason, such laws are unconstitutional under the Fifteenth Amendment.[107]

Eventually, four of the five states permitted Indians to vote regardless of taxation. New Mexico, however, persisted in its efforts to disenfranchise Indians based on the taxation issue.

In 1948, Miguel Trujillo, from Isleta Pueblo in New Mexico, was prohibited from voting because he did not have to pay state taxes on his property. Trujillo filed suit in federal court challenging the phrase "Indians not taxed" in the New Mexico Constitution.[108] The district court found the prohibition in the New Mexico Constitution constituted a violation of the fourteenth and fifteenth amendments.[109] Judge Phillips stated, for the court:

> Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any

---

[104] *Id.*

[105] IDAHO CONST. art. VI, § 3 (1890, amended 1950); N.M. CONST. art. XII, § 1; WASH. CONST. art. VI, § 1; MISS. CONST. art. 12, § 241 (1890, amended 1968).

[106] Op. Solic. Interior Dep't, M29,596 (Jan. 26, 1938).

[107] *Id.*

[108] Trujillo v. Garley, No. 1353 (D.N.M. Aug. 11, 1948) (three judge court).

[109] *Id.*, slip op. at 7.

> kind or character, if he possesses the other qualifications, may vote. An Indian, and only an Indian, in order to meet the qualifications to vote, must have paid a tax. How you can escape the conclusion that makes a requirement with respect to an Indian as a qualification to exercise the elective franchise and does not make that requirement with respect to the member of any race is beyond me. I just feel like the conclusion is inescapable.[110]

The cry of "representation without taxation" echoed again in the 1970s in New Mexico and Arizona.[111] The courts, however, failed to validate the arguments of opponents to Indian voters. In 1973, the Arizona Supreme Court held that an Indian may be elected to a county position even though he was immune from county and state taxation.[112] Similarly, the New Mexico Supreme Court ruled that Indians may vote on a school board issue even though they were not taxed for repayment of a bond.[113]

Indians Under Guardianship

A third means employed by states to deny Indians the right to vote was the claim that Indians were under guardianship and, therefore, ineligible to participate in elections. For example, according to the Arizona Constitution, "No person under guardianship, *non compos mentis*, or insane, shall be qualified to vote at any election . . . unless restored to civil rights."[114]

In 1928, two members of the Pima Tribe of the Gila River Reservation attempted to register to vote in the first presidential election held after the Indian Citizenship Act of 1924 had granted them citizenship. Robert Porter and Rudolph Johnson, the tribal members denied registration, sought a writ of mandamus directing the county registrar to enter their names on the county register.[115]

The Arizona Supreme Court considered two questions. First, was the Gila River Reservation within the boundaries of Arizona? If so, Porter and Johnson would be considered residents of Arizona.[116] Second, were Indians "under guardianship" within the meaning of the Arizona Constitution?[117]

---

[110] *Id.*, slip op. at 7-8.

[111] Shirley v. Superior Court, 109 Ariz. 510, 513 P.2d 939 (1973), *cert. denied*, 415 U.S. 919 (1974); Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

[112] *Shirley*, 513 P.2d at 939-40.

[113] *Prince*, 543 P.2d at 1176.

[114] ARIZ. CONST. art. VII, § 2.

[115] Porter v. Hall, 34 Ariz. 308, 271 P. 411, 412 (1928).

The court determined that Indians residing on reservations located within state boundaries were residents of Arizona.[118] The court, however, concluded that Mr. Porter and Mr. Johnson, as wards of the federal government, were "under guardianship" within the meaning of the Arizona Constitution and, thus, not qualified to vote.[119]

In reaching its decision, the court relied heavily on the language of Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*: "Their [tribes] relation to the United States resembles that of a ward to his guardian."[120] Numerous cases following *Cherokee Nation* are quoted with similar wording.[121]

In addition, the court refused to follow the earlier North Dakota case, *Swift v. Leach*, which rejected the "under guardianship" argument.[122] The court added that when the "Indian wards" are "released from their guardianship" by the United States, the state will entitle them "to vote on the same terms as other citizens."[123]

In a strongly-worded dissent, Chief Justice Ross pointed out that Indians are citizens by virtue of the Indian Citizenship Act of 1924.[124] More significantly, he argued that Chief Justice Marshall, in *Cherokee Nation*, stated that the Indians' relation to the United States *resembled* that of a ward to a guardian: "It is not a guardianship . . . but 'resembles' a guardianship."[125] The guardianship referred to in the Arizona Constitution is a court-determined legal guardianship, Ross argued; therefore, it has no application to Indians.[126]

The reasoning of Chief Justice Ross is correct. The federal-Indian trust relationship created in *Cherokee Nation* is unique and differs greatly from common law guardianship.[127] The federal obligation toward Indians is expressed in treaties, statutes, agreements, executive orders, and administrative regulations. These obligations define the required standard of conduct for federal officials and Congress. In matters not subject to federal restrictions or responsibilities, Indians are as independent and as competent as other persons. Moreover, common law guardianships are supervised by state courts and terminate if and when the disability (mental incompetency, infancy) ends.

---

[116] *Id.*, 271 P. at 413.

[117] *Id.*

[118] *Id.*, 271 P. at 415.

[119] *Id.* 271 P. at 418.

[120] *Id.*, 271 P. at 417 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1882).

[121] *Id.*, 271 P. at 417-18. *E.g.*, United States v. Kagama, 118 U.S. 375, 379 (1886) ("These Indians are wards of the nation. They are communities dependent on the United States."); *see also* Jones v. Meechan, 175 U.S. 1 (1899); Williams v. Johnson, 239 U.S. 414 (1915).

[122] *Porter*, 271 P. at 418-19 (citing Swift v. Leach, 45 N.D. 437, 178 N.W. 437, (1920)).

[123] *Id.*, 271 P. at 419.

[124] *Id.*

[125] *Id.* (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1882)).

[126] *Id.*

For twenty years, *Porter v. Hall* stood unchallenged. Upon returning home from fighting during World War II, many Indian veterans pushed for the right to vote.[128] In 1948, two Mohave-Apache Indians attempted to register to vote but were turned away. They filed suit and the Arizona Supreme Court again had the opportunity to interpret the meaning of the clause "persons under guardianship."[129]

This time the Arizona Supreme Court took a different view. The court distinguished between common law guardianship and the guardianship described in *Cherokee Nation v. Georgia*. Citing Chief Justice Ross' dissent in *Porter*, the court held the guardianship clause in the Arizona Constitution was "intended to mean a judicially established guardianship . . . [and] has no application to the plaintiff[s] or to the federal status of Indians in Arizona as a class."[130] The court noted that *Porter* was a "tortions [sic] construction by the [state] judicial branch of the simple phrase 'under guardianship', to accomplish a purpose never designed by the legislature."[131] Thus, *Porter* was expressly overruled by *Harris*.[132]

Indians As Non-Residents

An equally tenuous fourth argument used to bar Indians from voting was a residence clause in certain state election statutes.

---

[127] For a further discussion, see Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 CALIF. L. REV. 507, 508, 511-12 (1931).

[128] Approximately 25,000 Indians served in the armed forces during World War II. Peterson, *supra* note 74, at 123. In 1947, the President's Committee on Civil Rights declared the state prohibitions, such as those in *Porter*, discriminatory and explained that "[P]rotest against these legal bans on Indian suffrage in the Southwest have gained force with the return of Indian veterans to those states." REPORT OF THE PRESIDENT'S COMMISSION ON CIVIL RIGHTS 40 (1947).

[129] Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948).

[130] *Id.*, 196 P.2d at 463.

[131] *Id.*, 196 P.2d at 461.

[132] *Id.*, 196 P.2d at 463.

In the 1950s and 1960s, the New Mexico and Utah courts wrestled with the issue about whether a person living on a reservation located within a state was a resident of that state.

In a 1956 case, *Allen v. Merrell*,[133] the Supreme Court of Utah interpreted the state's election statute, which provided: "Any person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation."[134] The court concluded that the statute was not a denial of the right to vote on the basis of race in violation of the equal protection clause.[135] The court justified the residence requirement on three grounds: (1) tribal sovereignty, (2) federal government control of the reservation, and (3) Indians were not acquainted with the processes of government.[136] The court further reasoned that Indians do not speak English, do not pay taxes, and are not fully under state jurisdiction, and therefore, the residency statute was justified.[137] The *Allen* opinion also expressed a fear that the Indian population might outnumber the white voters, and it would be unfair to let them control state politics because they had "an extremely limited interest in its functions and very little responsibility in providing the financial support thereof."[138]

Allen was appealed to the United States Supreme Court, which vacated the decision and remanded it for rehearing.[139] In the interim, the Utah legislature repealed the disenfranchisement statute.[140]

In 1962, the New Mexico Supreme Court had occasion to consider the issue of residency involving Indians in *Montoya v. Bolack*.[141] The Indians' right to vote was challenged in vain by the unsuccessful candidate for Lieutenant Governor of New Mexico, who would have been the victor had the Navajo votes in San Juan and McKinley counties been thrown out.

Montoya contended that Indian reservations were not part of the state and, therefore, not a "residence" for voting purposes.[142] Moreover, he argued problems could arise with polling places located on reservations: If there was a violation of the state election code, nothing could be done because the state did not have jurisdiction on the reservation.[143]

---

[133] 6 Utah 2d 32, 305 P.2d 490 (1956).

[134] UTAH CODE ANN. § 20-2-14 (11) (1953).

[135] *Allen*, 305 P.2d at 495.

[136] *Id.*, 305 P.2d at 492.

[137] *Id.*, 305 P.2d at 495.

[138] *Id.*

[139] 353 U.S. 932 (1957). For further discussion of *Allen*, see Note, *Denial of Voting Rights to Reservation Indians*, 5 UTAH L. REV. 247 (1956).

[140] Act of Feb. 14, 1957, ch. 38, 1957 Utah Laws 89-90.

[141] 70 N.M. 196, 372 P.2d 387 (1962).

In upholding the Indians' right to vote, the court recognized that lack of state jurisdiction over Indians "is of serious moment, but so is the refusal of the right to vote."[144]

Tribal Sovereignty

During the nineteenth century, opponents of Indian citizenship took the position that maintaining tribal ties was incompatible with citizenship, being 'civilized', and voting in state elections.[145] This argument was discussed and disposed of in early cases.[146] However, in recent voting rights litigation, states and local officials have resurrected the argument to abridge and diminish the voting rights of Indians.

The argument used by states is that Indians do not care or wish to participate in state or county affairs, and instead rely on the tribal and federal government for certain services and political participation. Therefore, states maintain, tribal sovereignty, rather than discrimination, explains the state government's treatment of Indians and also the diminished participation of Indians in state and local political activities.[147]

The tribal sovereignty/reduced participation position has been rejected by the federal government. When Congress extended the protections of the Voting Rights Act of 1975,[148] it considered the tribal sovereignty argument. Congress found that discrimination against Indians and other language minorities by the states "was substantial" and that "[l]anguage minority citizens, like blacks throughout the South, must overcome the effects of discrimination as well as efforts to minimize the impact of their political participation.[149] Based upon an "extensive evidentiary record" demonstrating the prevalence of voting discrimination against Indians,[150] Congress extended the special pre-clearance provisions of section 5 to include language minorities. It also required a number of jurisdictions with Indian populations to provide bilingual election procedures.[151] Congressional action in extending the Voting Rights Act to Indians belies state arguments that diminished political participation of Indians is unrelated to discrimination.

---

[142] *Id.*, 372 P.2d at 388.

[143] *Id.*, 372 P.2d at 394.

[144] *Id.*

[145] See *supra* notes 88-97 and accompanying text.

[146] For example, see Swift v. Leech, 45 N.D. 437, 178 N.W. 439 (1920).

[147] *See* Defendant's Brief on Remand, Buckanaga v. Sisseton School Indep. Dist., No. 84-1025 (1988); Defendants' Post-Trial Brief, Windy Boy v. County of Big Horn, 647 F. Supp. 1002 (D. Mont. 1986) (No. CV83-225 BLG-ER).

[148] Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400, 402; S. Rep. No. 295, 94th Cong., 1st Sess. 38 (1975).

[149] S. Rep. No. 295, 94th Cong., 1st Sess. 24, 38 (1975).

Congress again disposed of the tribal sovereignty claim when it amended section 2 of the Voting Rights Act of 1982.[152] Section 2 expressly applies to Indians; Congress stated that it was adopting a nationwide standard for vote dilution.[153] Thus, state arguments that Indian vote dilution cases are unique or are somehow an exception to the Voting Rights Act are unavailing.

In *Windy Boy v. County of Big Horn*,[154] the Montana federal district court rejected the tribal sovereignty/reduced participation position. In *Windy Boy*, the court considered the issue of dual status and whether it reduced Indian political participation. The court stated:

> The Court does not find that dual sovereignty explains the inability of Indians to participate fully in the political processes of Big Horn County. Indians, for example, as concerned about schools as white citizens, and a good number have run for school board over the last twenty years. There is no evidence that interest in tribal affairs has not in any lessened Indian parents' involvement in their children's education. Racially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the country, far better than existence of tribal government.[155]

The tribal sovereignty/reduced participation position has also been equated to the arguments made by southerners to justify black disenfranchisement and white supremacy—that is, that black-white relations were special or unique, that blacks preferred segregation, that they wanted to be separate from whites, that they did not want to register and vote, and that they preferred their own way of doing things.[156] Like many generations of southerners who defended segregation, the states seek to blame the victim for the crime.

---

[150] *Id.* at 24.

[151] 42 U.S.C. §§ 1973c, 1973b, 1973aa-1a (1976); 28 C.F.R. § 55 app. (1984).

[152] Pub. L. No. 97-205, § 2, 96 Stat. 131, 131-32 (codified at 42 U.S.C. § 1973(a) (1973)).

[153] S. Rep. No. 417, 97th Cong., 2d Sess. 27, 42 (1982).

[154] 647 F. Supp. 1002 (D. Mont. 1986).

[155] *Id.* at 1021.

Finally, the argument that Indians have less political energy than whites to exert on state or county elections because their time is spent exclusively on tribal matters is a variant of the "apathy" argument which has been used to justify the exclusion of blacks from political participation in the South—an argument uniformly rejected by the courts.[157] States would be hard-pressed to demonstrate a case that Indians have less political energy than whites. History shows Indians have, in fact, participated and are willing to participate when given the opportunity. Indeed, studies of Indian voters in the states of Montana, South Dakota, Washington, Arizona, and New Mexico demonstrate that issues of concern to Indian voters can impact the outcome of state and local elections.[158]

The Continuing Quest for Full Political Participation

The majority of blatant legislation and local actions which prohibit Indians from voting have been repealed or struck down by the courts. Registration of Indian voters has increased substantially, resulting in a dramatic increase in the number of

---

[156] This argument was presented by the plaintiffs in *Windy Boy*. Plaintiff's Response to Defendants' Post-Trial Brief at 9, *Windy Boy* (No. DV 83-225-BLG). *See also* Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973) (discussion of the disenfranchisement of blacks after Reconstruction).

[157] United States v. Marengo County Comm'n, 731 F.2d 1546, 1568 (11th Cir. 1984); United States v. Dallas County Comm'n, 739 F.2d 1529, 1536 (11th Cir. 1984); Kirksey v. Board of Supervisors, 554 F.2d 134, 145 (5th Cir. 1977).

[158] A recent political behavior study at the Tohono O'dham and Gila River Reservations in Arizona concluded that a candidates' stand on Indian issues and concerns for Indians were very important, receiving high percentages of 81% and 86% respectively. NAT'L INDIAN YOUTH COUNCIL, POLITICAL AND ATTITUDES BEHAVIOR POLL AT TOHONO O'ODHAM AND GILA RIVER, ARIZONA (1986). Similarly, a poll conducted on the Navajo Reservation showed that 69% of Navajos interviewed found a candidate's concern for Indian issues and people the most important factor. NAT'L INDIAN YOUTH COUNCIL, NAVAJO INDIAN POLITICAL ATTITUDES AND BEHAVIOR POLL 16 (1984).

Helen Peterson examined Indian voters in the 1952 and 1956 elections and found Indians turning out to vote against specific policies affecting Indians. Peterson, *supra* note 74, at 125. Stephen Kunitz's and Jerrold Levy's study of Navajo voting in the 1968 national election and Jack Holmes' review of Navajo voters in the 1967 New Mexico election showed Navajos voting on issues of importance to them and supporting specific candidates sponsoring such issues. Kunitz & Levy, *Navajo Voting Patterns*, PLATEAU, Summer, 1970, at 1, 1-8; J. HOLMES, POLITICS IN NEW MEXICO (1967). *See also* D. McCOOL, *supra* note 91, at 116-28.

Indians voting.[159] Indians are seeking election to local school boards and state government positions. Grassroots coalitions and groups formed in Indian communities are registering Indian voters door-to-door, sponsoring candidate forums, and providing voter information on significant issues. The result is a greater awareness among Indians of their voting rights and the significant influence they can have on local, state and county elections.

In 1986, a National Indian Youth Council report showed there were 852 Indians holding a nontribal elected office. Of the officeholders, more than 90% were serving on school boards, 49 were serving in state-level positions, and one served in Congress.[160]

A consequence of this upsurge in Indian political action and success in the election of Indian candidates is a marked increase in voting rights litigation. Indians are challenging state-devised election schemes and systems that submerge Indian voting strength or deny equal and effective participation in the political process. The primary tool utilized by Indian voters to assert and protect their fundamental constitutional rights is the Voting Rights Act of 1965.[161]

The Voting Rights Act of 1965 is the culmination of efforts to create an effective remedy for the systematic discriminatory voting practices against minority communities. The Act is aimed at precluding state government officials from interfering with the right of minorities to register and vote. It is a complex compilation of general provisions that are permanent and affect all states and specific provisions that are temporary and only affect jurisdictions that meet particular criteria stipulated in the Act.[162]

The most important provisions of the Act are section 2, which bans voting practices that result in the denial or abridgment of the right to vote on account of race, color, or membership in a language minority,[163] and sections 4 and 201, which abolish "tests and devices" for voting.[164] In 1970, Congress extended the ban for five years and made it applicable nationwide.[165] Five years later, Congress made the ban permanent.[166] In 1982, Congress amended section 2 by adopting the results standard, primarily in response to *City of Mobile v. Bolden*.[167]

---

[159] *See Windy Boy*, 647 F. Supp. at 1004, 1007; D. McCool, *supra* note 91, at 119-20. Despite this undeniable progress, registration and turnout of Indian voters can still be characterized as low, as with other minority voters.

[160] Nat'l Indian Youth Council, Indian Elected Officials Directory (Nov. 1986). The sole congressman is Ben Nighthorse Campbell, a Northern Cheyenne residing in Colorado.

[161] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1982)).

[162] Provisions of the Voting Rights Act are described in U.S. Comm'n on Civil Rights, The Voting Rights Act: Unfulfilled Goals 4-21 (1981) [hereinafter Unfulfilled Goals].

Other permanent provisions of the Act make it a crime to deprive or intend to deprive anyone of the rights protected by the Act,[168] abolish durational residency requirements, and establish uniform standards for absentee voting during presidential elections.[169] Additionally, the Act provides that any voter who needs assistance because of a disability or an inability to read or write is entitled to assistance.[170]

---

[163] In 1982, Congress strengthened the protection of the Act by amending § 2. *See* Voting Rights Act of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 131-32 (codified at 42 U.S.C. § 1973(a) (1973)). Amended § 2 provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race, color or in contravention of the guarantees set forth in section 1973 (f) (2) of this title as provided in subsection (b) of this section.

Id.

[164] 42 U.S.C. § 1973b (1976). Congress did not outright ban the use of the poll tax as a condition for registration but did determine that the tax "denied or abridged" the right to vote. Congress authorized the United States Attorney General to bring suit in any jurisdiction where the tax was used to enjoin its enforcement. *Id.* § 1973h.

[165] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314. The Act had previously applied to specific jurisdictions.

[166] Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 402.

[167] 446 U.S. 55 (1980). In 1980, a sharply divided Court established a subjective intent standard for vote dilution claims under the Constitution and § 2 of the Act. The plurality held that proof of racial purpose was a prerequisite for a violation of voting rights. *Id.* at 72-74. For a discussion of the standard in vote dilution cases applied by the courts pre-*Bolden*, see Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715 (1983).

[168] 42 U.S.C. § 1973j (1976).

[169] *Id.* § 1973aa-1.

[170] Voting Rights Act, Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134-35 (codified at 42 U.S.C. §§ 1973aa-6 (1983)). Another provision of the Act allows the Attorney General to send federal examiners to covered jurisdictions when the Attorney General has received twenty or more written complaints alleging voter discrimination in that jurisdiction. 42 U.S.C. §§ 1933d, 1933f (1976).

Under §§ 3(a) and 3(c) of the Voting Rights Act, a federal court can order a jurisdiction to pre-clear [obtain approval] of its upcoming election. The federal court can then authorize the appointment of federal examiners if the Attorney General or an aggrieved person files suit to enforce the voting guarantees of the fourteenth and fifteenth amendments. 42 U.S.C. § 1973a(a) (1976). Under § 5 of the Act, certain jurisdictions

Bilingual Elections

A special provision of the Act requiring assistance to language minorities (American Indians, Asian-Americans, Alaska Natives and Hispanics) was added in 1975.[171] This provision was recently extended until 1992.[172] In 1975, Congress determined that "voting discrimination against citizens of language minorities is pervasive and national in scope."[173] It further concluded that, based on testimony, language minorities had "been denied equal educational opportunities by state and local governments" causing them to have "severe disability and continuing illiteracy" in English.[174] Language barriers combined with English-only registration and voting procedures excluded language minorities from effective political participation. These were excellent reasons for congressional passage of the special minority language provisions.

---

are encompassed by the Act and, therefore, are required to submit proposed changes in its voting laws, practices, or procedures to either the U.S. Attorney General or the U.S. District Court for the District of Columbia. *See* 42 U.S.C. § 1973c (1982 & Supp. IV 1986).

Federal examiners have been appointed in two jurisdictions affecting Indians in situations not covered under the section. In United States v. Thurston County, Nebraska, No. 78-0-380 (D. Neb. May 9, 1979) (consent decree), pre-clearance was stipulated in a consent decree between the County and the Attorney General. The Attorney General challenged the County's at-large method of electing its board of supervisors. It argued that this method diluted the voting rights of members of the Omaha and Winnebago Tribes, in violation of § 2 of the Voting Rights Act. The consent decree required county commissioners to be elected from single member districts. In addition, Thurston County was placed under § 3(a), federal examiners were appointed, and the jurisdiction was required to pre-clear its election changes for 5 years. *Id*. at 3.

The second case, United States v. Town of Bartelme, No. 78-C-101 (E.D. Wis. Feb. 17, 1978), involved Indian residents of the Stockbridge-Munsee Reservation in Wisconsin. The United States alleged the Bartelme and Shawano County, Wisconsin, denied residents of the Stockbridge-Munsee Reservation the right to vote. Town residents had signed a petition that would sever the Reservation from the town. The petition was approved by the County. Thus, residents of the Reservation were no longer allowed to vote in city or county elections. However, a preliminary injunction was issued ordering the town to allow residents of the Stockbridge-Munsee Reservation to vote.

[171] Voting Rights Act, Amendments of 1975, Pub. L. No. 94-73, § 207, 89 Stat. 401, 402 (codified at 42 U.S.C. § 1973 1(c)(3) (1982)) (amending § 14(c)(3) of the Act).

[172] *See* Pub. L. No. 97-205, § 4, 96 Stat. 131, 134 (codified at 42 U.S.C. §§ 1973aa-1a (1982)).

[173] Voting Rights Act, 1975 Amendments, Pub. L. No. 94-73, § 203, 89 Stat. at 401 (codified at 42 U.S.C. § 1973b(f)(1) (1982)) (amending § 4(f)(1) of the Act).

[174] *See Extension of the Voting Rights Act of 1965: Hearing on S.407, S.903, S.1297, S.1409 and S.1443, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 214-19, 255-68, 738-56, 756-89 (1975).

Specific jurisdictions under this section are required to provide bilingual forms and notices, bilingual ballots, bilingual voter information, and oral assistance at the polls.[175] The provisions also provide that when the language of the minority is oral or unwritten, as many Indian languages are, the specific jurisdiction[176] is "only required to furnish oral instructions, assistance, or other information relating to registration and voting."[177]

Two Navajo cases, *Apache County High School Dist. No. 90 v. United States*[178] and *United States v. County of San Juan, New Mexico,*[179] are illustrative of the types of problems that arise with the bilingual requirements.[180] In 1975, the Apache County High School District in Arizona brought a declaratory judgment in the United States District Court for the District of Columbia in order to pre-clear its bilingual plan for a bond election. In *Apache County High School Dist. No. 90 v. United States*, the district court denied the school district's request and found it had "deliberately failed to inform the Navajos" about the election issues and the issues, because it had not disseminated information in the Navajo language and it had not sent information to Navajo chapter officials.[181] Further, the court found the school district had not provided bilingual Navajo poll workers and it had limited the number of polls on the Navajo Reservation.[182]

A second, similar suit was brought five years later. In *United States v. County of San Juan, New Mexico*, the United States alleged that San Juan County failed to provide "oral instructions, assistance, and other information relating to the registration and voting process in the Navajo language whenever such language was provided in English";[183] failed to provide an adequate number of bilingual Navajo interpreters;[184] and failed to provide sufficient information (in the Navajo language) concerning locations of polling places.[185]

---

[175] 42 U.S.C. §§ 1973(b)(f)(3), 1973aa-1a(b), (c) (1982); 28 C.F.R. § 55.19 (1980).

[176] *See* 28 C.F.R. § 51 appendix (1988) for jurisdictions covered under § 5 and the minority language provisions.

[177] 42 U.S.C. §§ 1973(f)(4), 1973aa-1a(c) (1976).

[178] No. 77-1815 (D.D.C. June 12, 1980).

[179] No. 79-508JB (D.N.M. April 8, 1980).

[180] These two cases are discussed extensively by the U.S. Commission on Civil Rights in UNFULFILLED GOALS, *supra* note 169, at 87-88.

[181] *Apache County High School*, No. 77-1815, slip. op. at 4.

[182] *Id.* at 5-6.

[183] Complaint at 4, *United States v. County of San Juan, New Mexico* (No. 79-508JB).

[184] *Id.*

The parties entered into a settlement in which San Juan County agreed to comply with the minority language provisions in preparing and conducting elections.[186] In addition, the County agreed to (1) train poll workers in aspects of voter registration and in giving assistance to bilingual voters; (2) establish more poll places on the Navajo Reservation; (3) publish voting information in Navajo and English; and (4) undertake a voter registration of Navajos.[187]

Section 2 of the Voting Rights Act

In 1982, Congress amended the Voting Rights Act.[188] The amendments to section 2 received the great debate because the requirement of proving a discriminatory purpose for a section 2 violation was eliminated.[189] Amended section 2 provides that any voting law or practice which "results" in discrimination on account of race or color, or language minority status, is unlawful.[190]

In *Bolden*, the Supreme Court stated that proof of a discriminatory purpose was required to establish a statutory violation of section 2.[191] Congress responded directly to *Bolden* by amending the Voting Rights Act. The report of the House Committee on the Judiciary explained the purpose of the amendment was "to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision" and "to restate Congress' earlier intent that violations of the Voting Rights Act, including section 2, could be established by showing the discriminatory effect of the challenged practice,"[192] and the dilution or diminishment of the voting strength of minority voters. Both the House and Senate reports give detailed guidelines on the implementation of section 2 and congressional intent in amending the Act.[193]

---

[185] *Id.*

[186] *Id.* For minority language provisions, see 25 U.S.C. § 1973aa-1a (1982).

[187] *United States v. County of San Juan County, Utah*, No. 79-508JB, stipulation at 4.

[188] Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971-1975e (1982)).

[189] *Id.* at 134. *See* Parker, *The Results Test of Section 2 of The Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715 (1983) (discussion of the amendments to § 2).

[190] Pub. L. No. 97-205, § 2, 96 Stat. 131, 131-32 (codified at 42 U.S.C. §§ 1973(a) (1982)).

[191] City of Mobile v. Bolden, 446 U.S. 55, 60-74 (plurality opinion).

[192] H.R. No. 227, 97th Cong., 1st Sess. 29 (1981).

Vote dilution is "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group."[194] Vote dilution takes many forms, including reapportionment plans that fragment or concentrate populations,[195] staggered terms,[196] majority vote requirements,[197] annexations,[198] and numbered posts.[199] The predominant form of vote dilution today is at-large voting or multi-member districting.

Under an at-large scheme, residents of a school district or county vote for the membership of the school board or county commission. The majority, if it votes as a bloc, can choose all the board members or officials, thus denying the minority an effective opportunity to elect representatives of its choice. These election systems can and do negate the gains made by minority voters under the Voting Rights Act.

The amendment to section 2 and the subsequent Supreme Court decisions[200] have greatly supported Indian vote dilution claims. Most of the litigation has been initiated or supported by the Native American Rights Fund, National Indian Youth Council, the Legal Services Corporation, and the American Civil Liberties Union.

---

[193] S. REP. No. 417, 97th Cong., 2d Sess. 27, 28-9 (1982). These factors are taken from the pre-*Bolden* voting cases of White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[194] C. DAVIDSON, MINORITY VOTE DILUTION 4 (1984). The basic voting dilution principles derive from the one person-one vote reapportionment case of Reynolds v. Sims, 377 U.S. 533 (1964). There, the Supreme Court stated:

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount . . . that federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their voters discounted.

Id. at 555 n.29 (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

[195] *See* Windy Boy v. County of Big Horn, 647 F. Supp. 1002 (D. Mont. 1986).

[196] *See* City of Rome v. United States, 446 U.S. 156 (1980).

[197] *See* City of Port Arthur v. United States, 459 U.S. 159, 167 (1982).

[198] *See id.* at 166-67.

[199] *See* Rogers v. Lodge, 458 U.S. 613, 627 (1982).

[200] *See id.*; Thornburg v. Gingles, 478 U.S. 30 (1986).

In 1986, in *Windy Boy*, the federal district court in Montana alleged the Big Horn County and School District's at-large election schemes were violative of section 2. *Windy Boy* came about as a years of unsuccessful attempts by Crow and Northern Cheyenne individuals to elect an Indian to the county commission and to the school board. The Indian plaintiffs presented extensive evidence of past and continuing discrimination or polarization in voting, public accommodations, employment, appointments to boards and commissions, police protection, political associations, housing, social and business organizations, and churches. Historians, political scientists, and statisticians, serving as expert witnesses on behalf of the plaintiffs, recounted the record of discrimination in Big Horn County.[201] The court decided overwhelmingly in favor of the plaintiffs and ordered the county and school district be redistricted into single-member districts.[202]

The use of single-member districts is an effective remedy to voter dilution in at-large voting schemes. Single-member districts have been utilized in several claims against at-large voting in New Mexico,[203] Arizona,[204] and Colorado.[205]

Where the minority population is geographically dispersed, single-member districts do not always provide an equal opportunity for minorities to elect representatives of their choice.[206] Limited and cumulative voting schemes are alternatives. In a cumulative system, a voter casts a multiple vote for less than a full slate of candidates (i.e., a voter casts more than one vote).[207] A voter does not have to belong to a plurality or a majority of the electorate in order to elect a candidate of his choice. Cumulative voting has recently been used during settlements of minority vote dilution cases in Alamagordo, New Mexico; Peoria, Illinois; and several towns in Alabama.

---

[201] *Windy Boy*, 647 F. Supp. at 1006. In racial vote dilution cases, the courts have utilized several standards to demonstrate vote dilution. In *Windy Boy*, the court relied on the factors developed in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

[202] *Windy Boy*, 647 F. Supp. at 1023. A single member district is where members of the minority group constitute a majority.

[203] Tso v. Cuba Indep. School Dist., No. 85-1023-JB (May 18, 1987) (consent decree); Largo v. McKinley Consol. School Dist., No. 84-1751 HB (Nov. 26, 1984); Estevan v. Grants-Cibola County School Dist., No. 84-1752 HB (Nov. 26, 1984). In March 1985, the New Mexico legislature ended at-large voting schemes for all county commissions, except in counties with populations less than 2,000, and for all school boards, except districts with fewer than 500 students. *See also* Casuse v. City of Gallup, No. 88-1007-HB (D.N.M. 1988). Bowannie v. Bernalillo School Dist., No. CN88-0212 (D.N.M. 1988).

[204] Clark v. Holbrook Pub. School Dist., No. 3, No. 88-0148 PCTRGS (D. Ariz. 1988).

[205] Cuthair v. Montezuma-Cortez, Colo. School Dist. No. RE-1, No. 89-C-964 (D. Colo. 1990) (consent decree).

[206] See *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 160 (1985); Note, *Alternative Voting Systems As Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982); Still, *Alternatives to Single-Member Districts*, in MINORITY VOTE DILUTION, *supra* note 194, at 249-67.

The cumulative voting system has been adopted in a recent South Dakota case. In *Buckanaga v. Sisseton School District*,[208] members of the Sisseton Wahpeton Sioux Tribe challenged the at-large voting system. In 1980, the Sisseton School District contained 5,628 residents, of which 33.9% were Indian.[209] The school district was governed by a nine member board; three of the nine members were elected every year to three year terms.[210] Tribal members had consistently been candidates for seats on the school board, but had rarely been successful.[211]

On remand, the parties entered into a consent decree, agreeing to the use of cumulative voting rules in future elections.[212] Voters acquired the option of casting their three votes in any combination they wished. This allowed the school district to retain its at-large, staggered-term system, yet provided the tribal members with a more realistic opportunity to elect a candidate of their choice.

The first interim election under the new voting rules was held in June, 1989, and resulted in an Indian winning over a field of seven candidates. In the May, 1990, election, a full nine-member board was elected by the school district voters. Three Indians were elected to the board.[213]

Other discriminatory election laws and practices have fallen when challenged by Indian voters.[214] In a South Dakota case, a few days prior to the November, 1984, general election, a county auditor rejected registration cards from an Indian registration drive.[215] One day before the general election, the district court ordered the county officials to permit the Indians to vote.[216]

---

[207] *See* Note, *supra* note 213, at 148-49, 153-54.

[208] No. 84-1025 (D.S.D. 1985) (1985 WL 6683), *rev'd and remanded*, 804 F.2d 469 (8th Cir. 1986).

[209] *Id.*, 804 F.2d at at 470.

[210] *Id.*

[211] *Id.*, 804 F.2d at 476. The record showed that "from 1974 to the present [1986], there has been only one Indian board member; and since 1982, 23 Indians sought office and only 3 were successful." *Id.*

[212] Consent Decree, Buckanaga v. Sisseton Indep. School Dist., No. 84-1025 (1988).

[213] Report from Harvey DuMarce to the Native American Rights Fund (May, 1990) (unpublished report).

[214] *See, e.g.*, Love v. Lumberton City Bd. of Educ., No. 87-105-CIV-3 (D.N.C. 1987) (Lumbee Indians successfully challenged multi-member districting in North Carolina).

In addition, Indians conducting registration drives have been impeded by county officials. For example, a county auditor limited the number of application forms to be given to Indian voter registrars to ten-to-fifteen apiece. The registrars had traveled approximately eighty miles round-trip to begin their registration drive. In *Fiddler v. Sisker*,[217] the court held the county auditor had discriminated against Indian voters in violation of section 2. The court extended the deadline for voter registration by one week.[218]

In addition to the situations of *Fiddler* and *American Horse*, Indian voters have challenged the denial of polling places in outlying Indian communities. In *Black Bull v. Dupree School District No. 64-2*,[219] the Dupree School District was ordered to establish four polling places on the Cheyenne River Sioux Reservation. Prior to the lawsuit, Indian voters were forced to travel up to 150 miles round-trip to vote in school board elections.[220]

Indian voters have also been involved in reapportionment lawsuits. In *Sanchez v. King*,[221] New Mexico's reapportionment plan was found to be violative of the one-person one-vote principle. In *Sanchez*, the defendants were ordered to redraw districts in compliance with the principle of population equality. After the state legislature redrew the districts, Indian and Hispanic voters, in a second phase of the case, attacked the districting scheme on the grounds that the scheme resulted in an impermissible dilution of minority voting strength violative of section 2. A court-imposed redistricting plan was ordered into effect to bring the state into compliance.[222]

In summary, the above cases have demonstrated that as recently as eight years ago, Indian voters were covertly discriminated against, and were required to seek adjudication of a right long recognized as a personal right.

---

[215] American Horse v. Kundert, No. 84-5159 (D.S.D. Nov. 5, 1984).

[216] *Id.*, slip op. at 1 (Order).

[217] No. 85-3050 (D.S.D. Oct. 24, 1986). Similar evidence of discrimination was presented in *Windy Boy*. See *supra* notes 201-02 and accompanying text.

[218] *Fiddler*, No. 85-3050.

[219] No. 86-3012 (D.S.D. May 14, 1986) (Stipulation for Settlement).

[220] Prior to the stipulation, a temporary restraining order was ordered to halt the school board election.

[221] 550 F. Supp. 13 (D.N.M. 1982), *aff'd* 459 U.S. 801 (1983). *See also* Ratcliff v. Municipality of Anchorage, No. A86-036 (D. Alaska 1989) (challenge to reapportionment plan of city by Alaskan Natives).

[222] Sanchez v. King, No. 82-0067-M (Aug. 8, 1984).

Conclusion

This article has discussed the resistance by states and local entities to Indian participation in virtually every aspect of the electoral process. While early federal policies encouraged Indians to adopt the ways and practices of the majority society, Indians were prohibited from exercising their freedom of choice of representatives. The courts have played a major role in construing the numerous, and sometimes conflicting, federal statutes and regulations that seek to protect Indian voting rights, and will continue to do so in the future.

With the passage of the Voting Rights Act of 1965, Indians have intensified the fight for increased political participation and have made great strides in defeating the various discriminatory state voting schemes. Indians will continue to face the enduring legacy of racial discrimination as the campaign for equal voting rights spreads throughout Indian Country. Indians now know they can significantly influence the local political decision-making policies that affect their lives. Thus, Indians will continue to seek the goal of political equality envisioned in the fifteenth amendment and the Voting Rights Act of 1965.

Disputing the Dead

U.S. Law on Aboriginal Remains and Grave Goods

H. Marcus Price III

"This volume . . . will soon be the 'bible' for a new era of relationships with Native Americans, as well as a 'handbook' which will be indispensable for each state and institution involved. . . . It could only have been written by a person versed in both the law and culture of the United States. Dr. Marcus Price is already well known, but this volume will make him the leader in a new field."
—Fred Eggan, author of *The American Indian: Perspectives for the Study of Social Change*

This book compiles all relevant federal and state laws concerning the disposition of aboriginal remains, including the Native American Grave Protection and Repatriation Act of 1990. Price describes the laws themselves, the constitutional issues involved, the policies of federal agencies, and the practical application of the laws. For all the attorneys, educators, social activists, administrators, and legislators who are touched by the controversy, *Disputing the Dead* will be invaluable.

June, 152 pages, $37.50

University of Missouri Press
2910 LeMone Boulevard • Columbia, MO 65201 • 1-800-828-1894

AMERICAN
INDIAN
LAW
WRITING
COMPETITION
AMERICAN
INDIAN
LAW
WRITING
COMPETITIO
AMERICAN
INDIAN
LAW
WRITING
COMPETITI
AMERICAN
INDIAN
LAW
WRITING
COMPETITIO

The University of Oklahoma
College of Law
American Indian Law Review

AMERICAN
INDIAN
LAW
WRITING
COMPETITION

For information,
write to:

The University of Oklahoma
Law Center
American Indian Law Review
Norman, Oklahoma 73019

Sequoyah (c.1765–1843) A citizen of The Cherokee Nation who was entirely illiterate and could speak only his native language, Sequoyah invented a method by which his language could be written. Within twenty years, he taught his entire nation to read and write. This representation is based on the Charles Banks Wilson portrait on display in the Oklahoma State Capitol.

Mr. **Edwards**. Kevin Lanigan is an attorney with the D.C. office of Hogan & Hartson. Mr. Lanigan serves as counsel for the Mexican-American Legal Defense and Education Fund and has worked extensively in this area of voting rights.

Welcome and you may proceed.

STATEMENT OF KEVIN J. LANIGAN, HOGAN & HARTSON, ATTORNEY FOR THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Mr. **Lanigan**. Thank you, Mr. Chairman and distinguished members of the subcommittee. We've come today to urge in the strongest possible terms section 203 of the Voting Rights Act be both reauthorized and expanded in coverage.

Experience has proven, and Congress already has found, that voting discrimination against language minorities is pervasive and national in scope. The right to vote, of course, is guaranteed to all citizens of the United States, and the Supreme Court has long held that the right to vote is a fundamental one. Implicit in the right to vote is the right to cast an informed and effective vote.

In 1975, many States printed all of their registration and election materials only in the English language. Local election officials, in fact, did not exercise their option except in the rarest of cases to offer language assistance voluntarily. This obviously is still the case today, although in fewer States as a result of Congress' earlier attention to this issue. In jurisdictions where language minority voters reside in any substantial numbers, English-only elections preclude many of our fellow citizens from fully understanding the votes they cast while effectively deterring many others from voting at all.

As one Federal court has eloquently stated, and I quote, "The right to vote additionally includes the right to be informed as to which mark on the ballot or which lever on the voting machine will effectuate the voter's political choice. The voter who is not fluent and literate in English is just as surely disabled as the blind or physically incapacitated voter, and, therefore, in equal need of assistance."

Moreover, the limited English proficiency of many of our language minority citizens is all too often not a result of any voluntary choice, but of less than equal educational opportunities that are offered at the State and local levels.

Notwithstanding the natural progression of most of American citizens toward fluency in English, the extent of the need for language assistance in voting today may well be even greater than in 1975. This increased need is a product primarily of simple immigration trends and demographics. Data from the 1990 census indicate that a high level of immigration has made Asians and Hispanics the fastest-growing minority populations in the United States. native Americans have also registered significant gains in population over the last decade.

In addition, there has been a significant new development since Congress last took action on voting rights, and it is a development that directly implicates the progress of Congress' effort to try to broaden participation in the democratic processes in this country. Capitalizing on the purported threat said to be posed by immigrants to American culture and the English language, the English-only movement in this country has secured over the past decade enactment of English-only laws in many States and localities throughout the country. Some leaders of this movement charge that the provision of bilingual ballots results in language-minority citizens failing to assimilate into American culture because they have no incentive to learn English. This charge is simply not true. It is undisputed that learning the English language is critical to successful integration into American society and into the American economy. Accordingly, Hispanic and Asian immigrants are, in fact, acquiring fluency in English at approximately equivalent rates registered by earlier immigrant groups, and the overwhelming majority of language minority citizens know that it's critical that they learn the English language.

The issue presented today does not merely concern the renewal of a Federal mandate, but rather also the avoidance of these new local prohibitions. English-only laws, if given effect, could expressly prohibit bilingual voting materials on a widespread basis. There has been some discussion earlier today again that local election officials could just be left the option of offering language assistance wherever it's needed, but the fact is that today there are seven States with English-only laws that are wholly or partly covered by the language assistance of the Voting Rights Act. To the extent that section 203 would not be renewed, I think that it's quite possible that courts in those States would hold that local officials would not be able under State law to offer language assistance even where it's needed.

There is no question that State and local English-only laws which declare English the language of the ballot explicitly are facially inconsistent with section 203's language minority provisions and are overridden in jurisdictions that are covered by section 203 by virtue of the supremacy clause. These English-only laws, while thus rendered currently unenforceable by the existence of the Federal language assistance provisions in covered States and localities, would be given new life in the absence of the language assistance provisions. Language minorities in these jurisdictions could experience immediate and significant new impediments to voting that could ultimately affect their rights in education, employment, and other rights and privileges of citizenship as well.

Continuing and expanding this assistance to language minorities in order to make truly effective their right to vote is of such fundamental importance that cost should not matter. To the extent it does, however, the evidence is clear that the cost of language assistance is far from prohibitive. The first indepth look by Congress at the cost of language assistance was undertaken during the 1982 reauthorization process. The evidence submitted indicated at that time that the costs were far from burdensome. This finding was confirmed in 1986 by a General Accounting Office study; in 1991, by MALDEF survey; and again over just the last few months, by our own focused inquiry into the cost of providing language assistance under especially challenging circumstances that are found in Apache County, AZ, and San Francisco, CA.

Today, with the need as great or greater than it was in 1975 and with costs of language assistance demonstrably reasonable,

MALDEF asked Congress to reaffirm its commitment to equal access to voting by renewing for an additional 15 years and expanding in scope the language assistance provisions of the Voting Rights Act. In this way, Congress will continue the only effective remedy it has yet devised and implemented to the impediments faced by language minorities throughout the country and exercising their right to vote in an effective and informed manner.

I thank you for the opportunity to present this testimony, and I would be happy to answer any questions about these issues that members might have.

Mr. EDWARDS. Thank you, Mr. Lanigan. We'll have some questions later.

[The prepared statement of Mr. Lanigan follows:]

STATEMENT OF
KEVIN J. LANIGAN,
ATTORNEY FOR THE MEXICAN-AMERICAN
LEGAL DEFENSE & EDUCATIONAL FUND, INC.

Introduction

Chairman Edwards and distinguished members of the subcommittee, I am Kevin Lanigan, here representing the Mexican-American Legal Defense and Educational Fund, Inc. ("MALDEF"). */ My law firm, Hogan & Hartson, has a history of involvement in this issue as long as any, having represented MALDEF in 1975 in its efforts to secure initial enactment of section 203 of the Voting Rights Act of 1965 (the "Act").

We return today in order to urge, in the strongest possible terms, that section 203 be both reauthorized and expanded in coverage prior to its current August 6, 1992 expiration date. One of the two critical language assistance provisions of the Act, section 203 must be reauthorized in order to ensure that the right to vote guaranteed to all American citizens can be equally and effectively exercised by citizens who are "language minorities." Experience has proven -- and Congress already has found -- that voting discrimination against language minorities is "pervasive and national in scope." 1/ When language minorities are denied the ability to exercise effectively their right to vote, they

---

*/ Attached to this statement as Addendum 1, and submitted herewith for the record, is a March 4, 1992, memorandum prepared by Hogan & Hartson on behalf of MALDEF and entitled, Redressing Impediments to Voting Facing Language Minorities: The Need to Reauthorize and Expand Section 203 of the Voting Rights Act. This memorandum -- of which this statement is largely a distillation -- was previously submitted to the Senate Subcommittee on the Constitution.

are unable to elect their chosen candidates to political office; they are denied a rightful voice in representative government; and they are, consequently, effectively disenfranchised from the political process. 2/

In enacting the original language assistance amendments to the Voting Rights Act the 94th Congress found that:

> [V]oting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. . . . [W]here State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation.

On the basis of these findings, Congress determined that the barriers that had been erected between language minority voters and the ballot could not be permitted to stand:

> The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices. 3/

Unless Congress takes action in the coming months, however, the protections afforded by section 203 will lapse.

I. The Nature and Fundamental Importance of the Right to Vote

The right to vote is guaranteed to all citizens of the United States, 4/ and the United States Supreme Court has long held that the right to vote is a "fundamental" right. 5/ Implicit in the right to vote is the right to cast an informed and "effective" vote. 6/ The Supreme Court has recognized that "the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue." 7/

Notwithstanding the protections of the Fourteenth and Fifteenth Amendments, the U.S. Commission on Civil Rights noted that, prior to the Act's enactment,

> Numerous practices were used to deny minority citizens the right to vote, including physical intimidation and harassment, the use of literacy tests, the poll tax, English-only elections, and racial gerrymandering. . . . In many areas, minorities were almost totally excluded from the political process." 8/

Some of these abuses -- including primarily the continued use of English-only elections in jurisdictions not covered by the Act's language assistance provisions, or the less-than-enthusiastic implementation of minimal language assistance provisions in covered jurisdictions -- continue to detract from the rights of American citizens whose fluency and education are in languages other than English.

II. "English-only" Barriers to Language Minorities' Access to the Ballot

In 1975, Texas and many other states printed all of their registration and election materials only in the English language. In jurisdictions where language minority voters reside in any substantial numbers, such a procedure constitutes the functional equivalent of maintaining an English language literacy test as a prerequisite to voting. As one court eloquently stated:

> [T]he 'right to vote' additionally includes the right to be informed as to which mark on the ballot, or lever on the voting machine, will effectuate the voter's political choice . . . . [The voter not fluent and literate in English is] just as surely disabled as the blind or physically incapacitated voter, and therefore in equal need of assistance 9/

As individual American citizens who are members of language minority groups learn English, their need (on an individual basis) for language assistance in voting naturally diminishes. The existing data on this issue (including census data and recent studies) indeed show that language minorities, and specifically Hispanics, are learning English approximately as quickly earlier immigrants. Two oft-cited studies, a 1986 Rand Corporation study by McCarthy and Valdez 10/ and a 1988 study by Veltman, 11/ "show that the rate of English language acquisition by both native-born and immigrant Hispanophones (first language heard is Spanish) is impressive." 12/

Notwithstanding this natural progression of most American citizens toward fluency in English, however, the *extent of the need for language assistance in voting may well* be even greater today than in 1975. This increased need is a product, in the final analysis, of immigration patterns and simple demographics. Data from the 1990 Census indicate that a high level of immigration has made Asians and Hispanics the fastest growing minority populations in the United States. 13/ Native Americans have also experienced significant gains in population in the last decade. 14/

According to a census profile published by the U.S. Department of Commerce in June 1991, the Hispanic origin population in the United States has increased by 53 percent since the 1980 Census, from 14.6 million to 22.4 million. The number of persons identifying themselves as Asian or Pacific Islanders has increased by 108 percent, from 3.5 million in 1980 to 7.3 million in 1990. 15/ These figures reflect a "profile of an increasingly multicultural society, with virtually every corner of the nation drawing [the immigration of] Asians and Hispanics from a range of different national backgrounds." 16/

The Native American population, which includes Alaskan Natives (Eskimos and Aleuts), has increased by 38 percent, from 1.4 million to nearly 2 million. 17/ Taken together, these figures represent a nationwide percentage increase of

Hispanics, Asians, and Native Americans in the total population of the United States since 1980 from 6.4 percent to 9.0 percent, 1.5 percent to 2.9 percent and 0.6 to 0.8 percent, respectively. 18/

These increases call for even greater vigilance to ensure that members of language minority groups, once they attain citizenship, gain the fullest possible access to our democratic processes. For a decade-and-a-half, the Act's language assistance provisions have contributed significantly to the realization of this goal, 19/ and it is vital that they continue to do so in the future.

The latest wave of Asian and Hispanic immigrants apparently has proven disconcerting to some, who perceive an increase in such immigrant populations as a "threat to 'United States culture' and to the English language." 20/ This most recent blossoming of nativist sentiment has given impetus to an insistence that English be declared the "official language" of the United States, including for purposes of elections.

Fueled by an unfounded fear that the cultural and linguistic differences of the new Hispanic and Asian immigrants create a "cultural separatism" threatening to the identity and unity of the United States. 21/ This "movement" charges that given the governmental provision of bilingual education, bilingual government services, and, most relevant here, bilingual ballots, Hispanics and Asians are failing to assimilate into American culture because they have no incentive to learn English. 22/ Consequently, proponents have mounted a nationwide campaign and have seen a measure of success in securing the enactment of "official English" and "English-only" legislation at the state and local levels. Legislation to similarly amend the U.S. Constitution has been repeatedly introduced, but never yet enacted.

Although English is considered by many Americans to be the national language, the United States does not in fact have an official language -- no more than it has a state religion. 23/ This is no mere oversight, but rather is reflective of an affirmative philosophy that tolerance is more consistent with this nation's republican spirit, as opposed to the intolerance that characterized many of the nations and societies that prompted much of the immigration to these shores. In expressly rejecting the adoption of an official language as undemocratic and divisive, the Framers of the Constitution "believed that leaving language to individual choice was in keeping with the notions of individual freedom upon which the country was founded." 24/ According to one noted historian, the country's early political leaders recognized the "close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on those freedoms." 25/ The Framers correctly concluded that, in time, the ascendancy of English would be widely accepted -- as it indeed is today -- and that serious resistance could be provoked only if government sought to limit or require the abandonment of the usage of native languages by minority groups. 26/

Enactment by Congress in 1975 of the Act's language assistance provisions represented a positive affirmation of the principles of toleration with which this country was founded. Reauthorization of these provisions in 1992 would be a vital and necessary reaffirmation of these same principles, and a meaningful and effective guarantee to all citizens of the fundamental right to vote.

English-only laws, as they exist today in some states and localities, if given effect could expressly prohibit bilingual voting materials on a widespread basis. There is no question that state and local English-only laws which declare English the "language of the ballot" are facially inconsistent with section 203's language minority provisions and are overridden -- in jurisdictions covered by section 203, at least until August 6, 1992 -- by virtue of the Supremacy Clause of the United States Constitution. 27/ Such English-only laws, while thus rendered currently unenforceable by the existence of the federal language assistance provisions in covered states and localities, would be given new life in the absence of the countervailing federal law. 28/

Lapse of section 203's language assistance provisions would not merely leave a void, but would in numerous states and subdivisions give real effect to these local English-only laws. Thus, if the Act's language assistance provisions are not reauthorized, the potential effect of English-only legislation is significant: Language minorities in jurisdictions throughout the country could experience immediate and significant new impediments to voting, and, ultimately, to education, employment, and other rights and privileges of citizenship, in jurisdictions that have enacted English-only laws.

Since 1984, fourteen states, several municipalities, and Dade County, Florida, have enacted English-only legislation. 29/ To date, eighteen states have enacted legislation to declare English their official language: Alabama, Arizona, 30/ Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia. 31/

Generally, the state English-only laws fall into three categories. Seven states (Georgia, Illinois, Indiana, Kentucky, Mississippi, North Carolina, and North Dakota) have enacted "official English" laws which simply declare English to be their official language. 32/ Four states (Alabama, California, Colorado, and Florida) have enacted statutes or amended their state constitutions not only to declare English their official language, but also to empower the state legislature to act to preserve English as the "common language" of the State and (in Alabama and California) to expressly allow a private right of action against the state government to ensure the enforcement of this legislation. Six states (Arizona, Arkansas, Nebraska, South Carolina, Tennessee, and Virginia) have enacted legislation or amended their state constitutions to expressly declare English the language of the ballot and/or impose restrictions on the use of languages other than English in the exercise of official governmental functions, in employment, and in bilingual education. 33/

Broad and far-reaching English-only legislation -- such as the laws which declare English the "language of the ballot" -- pose an explicit, obvious, and immediate threat to the meaningful exercise of the right to vote by citizens who are language minorities. The most restrictive English-only law enacted to date is Article XXVIII of the Arizona Constitution, which was placed on the ballot by initiative and approved by Arizona voters in the general election on November 8, 1988. The text of the article declares that "[t]he English language is the official language of the State of Arizona. As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions." 34/

The State of Tennessee also has expressly declared English to be the language of the ballot. Section 4-1-404 of the Tennessee Code, enacted in 1985, states that:

> English is hereby established as the official and legal language of the State of Tennessee. All communications and publications, including ballots, produced by governmental entities in Tennessee shall be in English, and instruction in the public schools and colleges of Tennessee shall be conducted in English unless the nature of the course would require otherwise. 35/

Unlike the State of Arizona, the State of Tennessee is not presently required under the Voting Rights Act to provide any bilingual voting or registration materials to language minorities. 36/ Any voluntary language assistance which the state legislature or local governments otherwise might be inclined to provide to language minorities residing in Tennessee (there are approximately 75,000 Native Americans, Asians, and Hispanics in the state 37/) thus presumably would be prohibited by the express language of the Tennessee English-only law.

Laws which "only" declare English the official language of the state, in contrast, are considered "merely symbolic." However, the threat even of these "symbolic" laws, while more subtle, is also clear. Widely accepted as a "prototype" of "official English" legislation, the official-English amendment to the California constitution, commonly known as Proposition 63, states in pertinent part:

> The Legislature and officials of the State of California shall take all steps necessary to insure that the role of the English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California. 38/

Given the broad language used in the California provision, as well as similar provisions enacted by Colorado, 39/ Florida, 40/ and other states, such laws and be interpreted in the future to prohibit the provision of voting materials in any language other than English. Thus, notwithstanding the potential willingness and good faith efforts of local and state officials to provide multilingual ballots, language minorities living with English-only laws in states or subdivisions not covered by the Act's language assistance provisions are vulnerable to effective disenfranchisement -- as many more jurisdictions will be if section 203 is not reauthorized.

For example, only nine counties in the State of California are subject to the requirements of either section 4(f)(4) or section 203(c). 41/ Of these, three counties (Kings, Merced, and Yuba) are subject to the requirements of section 4(f)(4), and six counties (Fresno, Imperial, Kern, Madera, San Benito, and Tulare) are covered only under section

203(c). 42/ Notably, neither Los Angeles County nor San Francisco County are currently required under either provision to provide language assistance in voting and registration. Nevertheless, San Francisco voluntarily mails trilingual ballots in English, Spanish, and Chinese to all registered voters; Los Angeles provides bilingual ballots in Spanish upon request. However, since the passage of California's official-English amendment, proponents of English-only have threatened to mount a legal campaign against these efforts.

Denver and El Paso counties in Colorado also are not covered under either section 203(c) or 4(f)(4) of the Voting Rights Act. Nevertheless, in Denver all voting instructions, sample ballots, and ballots provided in the voting booth are voluntarily printed in Spanish as well as English. In El Paso County, bilingual sample ballots are provided at the polls and upon request. In addition, El Paso County provides bilingual election judges for precincts where 5% or more of the voting age population is Hispanic. According to a legislative council analysis of Colorado's English-only law, however, "proponents argue that the provision of the proposal [which declares the law self-executing] could be a legal basis to support challenges in the courts to any government programs in the State which circumvent its intent and meaning, or to invalidate any attempts by government to mandate the use of non-English

[sic], except where health, safety and justice or Federal laws require the use of non-English languages." 43/

While these English-only laws thus currently have no effect on elections in jurisdictions covered by the Act, their ultimate effect in jurisdictions not covered under either sections 4(f)(4) and 203(c) may be to limit the ameliorative discretion that local and state officials have exercised heretofore in providing more than the minimum requirements of federal law. In contrast, there are twenty-three counties in four presently covered states having English-only laws (Arizona, California, Colorado, and Florida). If 203(c) is not reauthorized, election officials in these jurisdictions may be immediately and affirmatively barred, by operation of existing local English-only laws, from continuing -- even voluntarily -- any form of language assistance.

III. The Cost of Language Assistance

Providing assistance to language minorities in order to make truly effective their right to vote is of such fundamental importance that the cost of language assistance should not matter. To the extent it does, however, the evidence is clear that the cost of language assistance is by no means prohibitive.

1. Previous congressional consideration. The first in-depth look by Congress at the cost of language assistance

occurred during the 1982 reauthorization process. The House and Senate Committees received considerable evidence that the costs were far from burdensome. The House Judiciary Committee stated that:

> The Committee record overwhelmingly shows that where language assistance in registration and voting is implemented in an effective manner, the cost accounts for only a small fraction of total election expenses. This fact is particularly evident in recent elections which indicate that costs have decreased significantly over the years. 44/

The Senate Judiciary Committee similarly concluded that the cost of providing language assistance, if done so efficiently, was a small percentage of a jurisdiction's total election costs. More importantly, the Committee reminded Congress of the significance voting has in our society: "even if the costs of bilingual election were higher, when viewed in proper perspective, the Committee believes that certain costs should be willingly incurred to make our most fundamental political rights a reality for all Americans." 45/

2. GAO report on costs. In 1986 the General Accounting Office ("GAO") published the results of an extensive analysis of the incremental costs attributable to the provision of language assistance during the November 1984 general elections. 46/ The GAO determined that, for jurisdictions who reported knowing their costs, the total cost for written

language assistance averaged 7.6 percent, as a percentage of total election costs. 47/

The costs of providing oral language assistance was even smaller: 205 jurisdiction reported no cost at all, and 39 reported a total cost of only $30,000. 48/ GAO attributed this low cost to the fact that, in most instances, jurisdictions use bilingual poll workers in areas that are targeted as needing such assistance. No additional cost is incurred under these circumstances because the bilingual poll workers perform all of the same duties of a regular poll worker in addition to providing the needed oral assistance. 49/

GAO observed that the cost of providing written language assistance declines over time because some of the election materials can be reused in subsequent elections, thus avoiding additional translating, proofreading, and printing costs. Costs also decline as election officials gain more experience at targeting materials only to those areas that actually need the assistance. 50/

3. MALDEF's 1991 survey. In 1991 MALDEF conducted a survey, entitled Election Official's Survey on Language Assistance Services, to assess the cost and extent of minority language assistance in selected jurisdictions. The survey was sent out to 120 county clerks (employed both in jurisdictions covered by sections 203(c) and/or 4 (f)(4), as well as certain

jurisdictions not covered by either provision) in Texas, California, Arizona, New Mexico, and Colorado. Officials in sixty-five of these jurisdictions respondud to the survey. Three specific issues relating to the cost of providing language assistance were addressed in the survey: (1) incremental registration costs; (2) incremental costs for printing ballots; and (3) incremental media costs.

MALDEF asked the counties to itemize the additional registration costs associated with personnel, printing, mailing, media, voter education, and other activities. 51/ For the 27 covered jurisdictions that responded to this question, the answers ranged from cost of no incremental costs at all, up to $69,000, with the average $6,518. For the four surveyed jurisdictions not covered by sections 203(c) or 4 (f)(4), but which provide a similar level of language assistance, the average cost was nearly identical. On the question of ballots, twenty-five of the counties responded that there were no incremental costs. Other counties reported that they believed there were additional costs, but could not determine the specific amount. Some counties estimated that roughly half of the cost of printing the ballots is the result of language assistance requirements. The incremental cost associated with publicizing the availability of language assistance services averaged $47 for the seventeen covered jurisdictions that responded to this question, and $288 for the five noncovered jurisdictions that responded.

4. Telephone interviews. The evidence presented during Congressional consideration in 1982, together with the exhaustive 1986 GAO study and the 1991 MALDEF survey, strongly suggests that the cost of providing language assistance is relatively inexpensive. Our in-depth review of election costs in San Francisco County, California, and Apache County, Arizona, is instructive in demonstrating that expanded coverage, if approved by Congress, should not significantly increase the costs of language assistance.

Apache County, Arizona includes a substantial portion of the Navajo Reservation. The Navajo Nation is the largest tribe in the country, and most members speak the Navajo language. As a result, Apache County, Arizona has more Native American voting age citizens than any other county in the "Lower 48" states, with the exception of Los Angeles. Apache County also has one of the highest percentages of "limited-English proficient" Native Americans. In 1990, voting age Native American citizens made up 76.5 percent of the County's total voting age population. 52/ According to 1980 Bureau of Census figures, 55.3 percent of Apache County's voting age, Native American citizens were "limited-English proficient." 53/ Thus, Apache County may fairly be considered a "most difficult case" scenario regarding the cost of providing language assistance to Native Americans.

Apache County is covered by section 4(f))4) for the Navajo language, and is operating its registration and election activities under a 1989 federal consent decree. (That Apache County's coverage is a result of section 4(f)(4) rather than section 203 does not affect the analysis of its costs in providing language assistance.) The two offices in Apache County that provide election-related services are the Apache County Recorder's Office, which is responsible for voter registration, and the Apache County Elections Office. The county recorder has a full-time outreach worker who is responsible for the county's efforts to increase Navajo voter registration. This outreach worker conducts periodic voter registration drives, recruits volunteer bilingual deputy registrars (currently there are 291), speaks at public meetings about registration and election matters, and sets up registration booths at rodeos and other pubic places. 54/ The elections office also has an outreach worker, whose duties include assisting in the preparation of the audio tapes, recruiting poll workers, and providing information on election-related matters. 55/

Both offices sponsor radio announcements in the Navajo language to inform the Navajo citizens about registration and election procedures, about measures that will be on the ballot, and about the offices that are being contested. The radio announcements are also used to recruit bilingual poll workers and to inform the Navajo citizens about the oral assistance that is available in registering and at the polls.

Because Navajo is a traditionally unwritten language, the elections office prepares audiotape versions of all election materials that are available in English. The office has prepared about ten tapes in the last two years which run in length from two to forty-five minutes. About 100 copies of each tape are distributed among the chapter houses and other public places, such as libraries and schools on the reservation. These tapes are prepared in close consultation with the Navajo Elections Administration, which is a tribal organization. 56/

The elections office is responsible for recruiting a sufficient number of bilingual poll workers for the precincts located on the reservation. Because Navajo is a traditionally unwritten language, precincts on the reservation are required under the consent decree to have two additional poll workers who are able to properly translate the ballot for Navajo voters who do not read or speak English. These two translators are paid the same as other poll workers ($65/day). In addition to the two officially designated translators, three poll workers from each precinct are usually trained in how properly to translate the English ballot into Navajo. This training session, which is in addition to the normal training that a poll worker receives, lasts about two hours and is held in three different locations across the county.

Various aspects of Apache County's registration and election procedures have been modified to comply with the terms of a May 1989 consent decree, which was the result of efforts by the Department of Justice to enforce both section 2 and section 4(f)(4) of the Voting Rights Act. 57/ The Department of Justice alleged that the County not only failed to provide effective language assistance, but also violated the Act through discriminatory practices in voter registration, absentee balloting, and voter registration cancellation procedures (all related to Navajo citizens). Many of the election services and assistance available in Apache County described here are the result of this consent decree. Some are directly related and limited to language assistance, while others -- such as the requirement for two outreach workers not only fulfill language assistance requirements but also provide better registration services for a group of people who live in very remote areas -- relate more directly to the elimination of impediments to voting that are more clearly in the domain of section 2 of the Act.

As noted above, the most significant obstacle to estimating language assistance costs for any local jurisdiction is that the election officials rarely separate language assistance expenses from general election expenses. This is also true for Apache County. However, because the Apache County consent decree is relatively new (and therefore the assistance provided under the terms of the consent decree are noticeably new expenses), the county was able to estimate the additional cost of complying with the consent decree. (Care must nevertheless be taken in analyzing these figures because the County is unable to differentiate the portion of the costs associated with language assistance from the cost associated with other (section 2) requirements of the consent decree.)

The elections office estimates that its annual cost (in an election cycle) associated with complying with the consent decree is about $41,700. These language assistance costs represented approximately 17% of the total expenditures ($239,000) for this office in the July 1990 to June 1991 fiscal year. A majority if not all of the kinds of activities undertaken by this office to comply with the consent decree are directly related to language assistance. Therefore we feel confident that the elections office figure of 17% during an election cycle may fairly be described as a high-end estimate of language assistance costs under the most difficult of circumstances.

An official with the county recorder stated that the costs associated with all of its requirements under the consent decree came to an estimated $52,500 for the 1990 election year (fiscal year 1990-1991). This office spent $106,303 on all voter registration activities in this same period. 58/ In our judgment, the services and assistance provided by the County Recorders Office are less directly related to language assistance and more closely related to remedying past discrimination related to registration, absentee ballots and voter purging. Therefore, only a fraction of this $52,500 can be attributed to language assistance.

The reliability of this analysis of the relatively low cost of language assistance -- even under especially challenging circumstances -- is confirmed by an examination of a second county that also has grappled with a demanding situation. Although it is not now covered by sections 203 or 4(f)(4) of the Voting Rights Act, San Francisco County, California, provides extensive language assistance to both Spanish and Chinese voters and would need to make very few changes to their election procedures in order to comply with section 203, if required to do so. San Francisco County is one of the very few jurisdictions that provides language assistance to two minority language groups that both have historically written languages.

Elections in California are far more expensive than the national average. It is not uncommon for California to have dozens of voter and legislative initiatives on the ballot in a single election; there were 29 statewide measures on the

November 1990 ballot. To inform the voter about these measures, the state publishes in English an elections pamphlet that reprints the full text of each of the measures along with a summary, a legislative analysis, a fiscal impact statement, and arguments for and against the measure. During the November 1990 general election California issued its elections pamphlet in two volumes (principle and supplemental), which together totaled 224 pages in length. The cost to the State for printing the English version of the pamphlet was $5,401,600. 59/

California also prepares a condensed Spanish version of the pamphlet, which cost the state $86,600 to print for the November 1990 election. (Translation costs were approximately $30,000.) The Spanish version of the pamphlet is used primarily in the nine counties that are covered by sections 4(f)(4) and 203. However, many of California's 49 other counties not covered by sections 4(f)(4) and 203 regularly receive copies of the pamphlet upon request. The State elections pamphlet is not translated into Chinese. 60/

San Francisco County translates and prints in both Spanish and Chinese condensed versions of an elections pamphlet describing local measures. For the November 1990 San Francisco elections, the Chinese and Spanish versions were both 60 pages, while the English version was 160 pages. The county also prints trilingual ballots, or provides for the use of translated facsimile ballots which can be used in conjunction with punch cards. Chinese and Spanish notices and announcements concerning election activities are placed in local Chinese and Spanish language newspapers and on the radio. In addition, San Francisco County places advertisements in the Spanish and Chinese language newspapers recruiting poll workers as part of its efforts to provide oral assistance at the polls. Bilingual employees within the county registrar's office provide oral assistance at other stages of the elections process.

The registrar's office estimates that language assistance costs the county approximately an additional $50,000 per election. A large portion of this -- about $17,000 to $20,000 -- pays for translations. As the County spends anywhere from $750,000 to $1,250,000 for each election, the combined cost of all of these language assistance activities represents only four to seven percent (4% to 7%) of the total election cost.

Conclusion

Given the impediments still posed by the continuing legacy of historical discrimination against language minorities in this country, compounded in many places now by state or local English-only laws, a strong consideration in favor of the reauthorization and expansion of section 203 of the Voting

Rights Act must be the critical need to ensure that the gains made to date in assisting language minorities to vote are not now lost.

Today, with the need as great or greater than it was in 1975, and with the costs of language assistance mandated by the Act demonstrably reasonable, MALDEF asks the 102nd Congress to reaffirm its commitment to equal access to voting by renewing for an additional fifteen years, and expanding in scope, its previous extension of the benefits of the Voting Rights Act to language minorities throughout the United States. In this way, Congress will continue the only effective remedies it has yet devised and implemented to the impediments faced by language minority persons in the United States in exercising their right to vote in an effective and informed manner.

Thank you for the opportunity to present this statement.

7195b/7083o

NOTES

1/ *See* 42 U.S.C. § 1973b(f)(1).

2/ In enacting the language assistance provisions of sections 203 and 4(f)(4), Congress found that "where State and local officials conduct elections only in the English language "citizens of language minorities [are] excluded from participating in the electoral process." *Id.* at § 1973aa-1a(a).

3/ *Id.*

4/ The Fifteenth Amendment to the U.S. Constitution states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race [or] color . . . ." U.S. Const. amend XV, § 1.

5/ *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is a "fundamental right" because it is "preservative of all rights").

6/ *See, e.g.*, *Garza v. Smith*, 320 F. Supp. 131, 136 (W.D. Texas 1970), *vacated and remanded for appeal to the Fifth Circuit*, 401 U.S. 1006 (1971), *appeal dismissed for lack of jurisdiction*, 450 F.2d 790 (5th Cir. 1971) ("[T]he 'right to vote' additionally includes the right to be informed as to which mark on the ballot, or lever on the voting machine, will effectuate the voter's political choice."); *Arroyo v. Tucker*, 372 F. Supp. 764, 767 (E.D. Pa. 1974) (The "'right to vote' means more than the mechanics of marking a ballot or pulling a lever. Here, plaintiffs [non-English speaking Puerto Ricans] cannot cast an 'informed' or 'effective' vote without demonstrating an ability to comprehend the registration and election forms and the ballot itself. The English-only election materials therefore constitute a device 'conditioning the right to vote' . . . on [the voter's] ability to 'read, write, understand, or interpret any matter in the English language.'") (citations omitted); *Torres v. Sachs*, 381 F. Supp. 309, 312 (S.D.N.Y. 1974) ("In order that the phrase 'the right to vote' be more than an empty platitude, a voter must be able effectively to register his or her political choice . . . . It is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired."); *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) (The Seventh Circuit agreed that "the 'right to vote' encompasses the right to an effective vote. If a person who cannot read English is entitled to oral assistance, if a Negro is entitled to correction of erroneous instructions, so a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or understand.")

7/ *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking down a Nebraska statute which prohibited the teaching of any subject in a foreign language before the completion of the eighth grade).

8/ U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 1 (September 1981) (citations omitted).

9/ *Garza v. Smith*, 320 F. Supp. at 136-37. *See also Arroyo v. Tucker*, 372 F. Supp. at 767; *Torres v. Sachs*, 381 F. Supp. at 312; *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d at 580.

10/ K. McCarthy & R. Burchiaga Valdez, *Current and Future Effects of Mexican Immigration in California* (1986).

11/ C. Veltman, *The Future of Spanish Language in the United States* (1988).

12/ A. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. L. Rev. 293, 314 (1989). These studies should also provide reassurance to those who might otherwise be concerned that language assistance in voting and bilingual education serves to deter the acquisition of fluency in English:

> The McCarthy and Valdez Study showed that the classic three-generation model of language acquisition is present for Hispanics. According to this model, the first generation is mainly monolingual in Spanish. The second generation is bilingual with working knowledge in both the native language and English, the language of the adopted country. By the third generation, English is the preferred language. This is the pattern previous immigrants followed and seems to be applicable to Mexican-Americans in California as well.
>
> The Veltman Study explored the language practices of all Hispanics. Veltman found that the acquisition of English by Hispanic immigrants is primarily determined by two factors: (1) how long the immigrant has

> lived in the United States and (2) how old the immigrant was when she arrived in the United States. Older teenagers and adults do not transfer to English as quickly as do younger immigrants. Nevertheless, the language shift of immigrants begins immediately upon arrival in the United States, progresses rapidly, and ends within approximately fifteen years. The Veltman Study concluded that Hispanic immigrants rapidly shift to the English language. The language shift from Spanish to English currently spans between two and three generations, with a two-generation model more likely in the future. Eventually, 52% of Hispanophones will adopt English as their principal language. Of the remainder, 39.7% will be Spanish bilingual. Spanish monolinguals comprise 8.3% of the native-born Hispanophone population.

Id. at 314-16 (citations omitted).

13/ See Economics and Statistics Administration, Bureau of the Census, U.S. Dep't of Commerce, 1990 Census Profile: Race and Hispanic Origin 1 ("1990 Census Profile") (June 1991).

14/ See id.

15/ See id.

16/ Vobejda, Asians, Hispanics Giving Nation More Diversity, Wash. Post, June 12, 1991, at A3.

17/ See 1990 Census Profile at 1.

18/ Id. at 2, Figure 2.

19/ With the benefit of language assistance for voters not fluent in English, language minority groups in covered jurisdictions are every year registering important, if gradual, gains. For example, in a 1991 special election, Arizona (which is covered statewide for Spanish heritage voters under section 4(f)(4), and separately covered under section 203 for Spanish heritage voters in most of the state's rural counties) elected the first Hispanic congressman in the state's history, Ed Pastor. There is still far to go, however. Of the nearly half million local elected officials in this country in 1987 (including counties, cities and towns, and school and special districts) only .41% were Native American (i.e., only about *one-half* of the Native American .8% proportion of the overall population); only 1.12% were Hispanic (about *one-eighth* of the Hispanic 9.0% proportion of the population); and only .08% were Asian American (only *one-thirty-sixth* of the Asian American 2.9% proportion of the population). *See* U.S. Dep't of Commerce, *1987 Census of Governments, Volume 1, Number 2: Government Organization/Popularly Elected Officials* xiii (1990).

20/ L. Mealy, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 Minn L. Rev. 387, 389-90 (1989) (citations omitted) .

21/ *See id*. *See also* Note, *"Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345, 1347-49, 1362 (1987); A.M. Ugalde, Note, *"No Se Habla Espanol": English-Only Rules in the Workplace*, 44 U. Miami L. Rev. 1209, 1227-28 (1990); L. Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. Rev. 17, 18 (Winter 1990).

22/ Note, however, that this narrow view of "American culture" excludes not only recent immigrants, but also (1) native-born Hispanic citizens in the Southwest whose roots there sometimes long predate the region's territorial acquisition by the United States and the first arrival of Anglo immigrants; (2) Puerto Ricans in New York, New Jersey, Massachusetts, and elsewhere, who are native-born American citizens whose native tongue also is Spanish; and (3) Native Americans -- our nation's first residents -- as to whom it is the declared policy of the United States government, as enacted by Congress, to encourage the use and preservation of Native American languages.

23/ *See* Califa, supra note 13, at 293 ("Two out of three Americans believe that English is the official language of the U.S." (citing Carelli, *Survey: Most Think English is the Official U.S. Language*, Assoc. Press, Feb. 14, 1987)).

24/ V. Lexicon, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 Hastings Const'l L.Q. 657, 658-59 (1987) (citing Marshall, *The Question of an Official Language: Language Rights and the English Language Amendment*, 60 Int'l. J. Soc. Lang. 8, 11 (1986)).

25/ Heath, "Language and Politics in the United States," *Linguistics and Anthropology* 267, 270 (M. Saville-Troike ed. 1972).

26/ *Id*.

27/ See U.S. Const. art. VI, cl. 2; see also 28 C.F.R. § 55.2(h).

28/ See Tau v. Carriere, 117 U.S. 201, 209-10 (1885).

29/ EPIC, State Update and Strategy Option, at 4 (April 3, 1989). The movement is far from satiated. In 1987, voter-initiated referenda to declare English the states' official language were proposed and considered in 33 states. During the 1988 presidential election, English-only legislation was proposed in 22 states. See S. Dharmadhikari, The Official English Movement in New York and The Nation, at 1 (Office of Immigrant Affairs, Department of City Planning, City of New York, June 27, 1989). In 1989, state legislators introduced English-only legislation in Connecticut, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, Utah, West Virginia and Wisconsin. See Mealy, supra note __, at 391, n.19. See also EPIC, supra, at 1 (listing also the state of Alabama, which would make the total nineteen).

30/ Article XXVIII of the Arizona Constitution was declared unconstitutional as violative of the First Amendment by the United States District Court for the District of Arizona in Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz.), amendment denied pending appeal, Yniguez v. Mofford, 130 F.R.D. 410 (D. Ariz. 1990), aff'd in part, reversed in part, Yniguez v. State of Arizona, 939 F.2d 727 (9th Cir. 1991).

31/ The states of Arizona, California, Colorado, Florida, Hawaii and Nebraska declared English the official language of the state through constitutional amendments, the state of Georgia by resolution, and the remaining states by statutory enactments.

32/ See, e.g., Ga. Comp. R. & Regs. res. 70 (1986) ("English i the official language of the State Georgia"); Ind. Code § 1-2-10 (1984) ("English is the official language of the Stat of Indiana"); Miss. Code Ann. § 3-3-31 (1972)("English languag is the official language of the State of Mississippi").

33/ Of the two remaining states, the Arkansas statute declares English the official language of the state expressly carving out an exception to the law's application: "This section shall not prohibit the public schools from performing their duty to provide equal educational opportunities to all children." Id. The State of Hawaii declares both English and Hawaiian the official language of the state and requires the use of the Hawaiian language for public acts and transactions only as provided by law. Id.

34/ Ariz. Const., art. XXVIII, § 1(2) (1988) (emphasis added).

35/ Tenn. Code Ann. § 4-1-404 (1985) (emphasis added).

36/ *See* Bureau of the Census, *Voting Rights Act Amendments of 1982, Determinations Under Title III*, 49 Fed. Reg. 25887, 25888 (June 25, 1984).

37/ According to data from the 1990 Census, 10,000 American Indians, Eskimos or Aleuts, 32,000 Asian or Pacific Islanders and 33,000 persons or Hispanic reside in the State of Tennessee. *See* 1990 Census Profile at 4-5. The Census Bureau has not released data on the number of language minorities in this jurisdiction based on 1990 Census Information.

38/ Cal. Const. art. III, § 6(c) (1986). The California law grants a private right of action to citizens to ensure the implementation of the law.

39/ Article III, Section 30a of the Colorado Constitution states that "[t]he English language is the official language of the state of Colorado . This section is self-executing; however, the General Assembly is empowered to enact laws to implement this Section."

40/ Article 2, Section 9 of the State Constitution for the State of Florida declares that "English is the Official Language of Florida. The Legislature shall have the power to enforce this section by appropriate legislation." Fl. Const. art. 2, § 9 (1988).

41/ *See* 49 Fed. Reg. at 25888.

42/ *Id*. Kings County, covered under section 203(c), is also covered under section 4(f)(4).

43/ Colorado Advisory Committee to the United States Commission on Civil Rights, *Nativism Rekindled: A Report On The Effort To Make English Colorado's Official Language* 6-7 (Summary Report September 1989) (quoting Letter and Ballot Analysis on Amendment Number 1 from Charles S. Brown, Staff Director, Legislative Council, Colorado General Assembly to Thomas V. Pilla, Civil Rights Analyst, Western Regional Division, U.S. Commission on Civil Rights at 1 (September 8, 1988)) (emphasis added).

44/ H. Rep. No. 227, 97th Cong., 2nd Sess. 26 (1982) (emphasis added). The House Judiciary Committee concluded, "[T]he testimony and the record before the Subcommittee clearly indicate that where cost is a problem it is so only because of factors unique to the relevant jurisdiction and/or because the method used in providing language assistance is not efficient or cost-effective." *Id*.

45/ S. Rep. No. 417, 97th Cong., 2nd Sess. 65 (1982).

46/ U.S. General Accounting Office, *Bilingual Voting Assistance: Costs of and Use During the November 1984 General Elections* (1986).

47/ *Id*. at 17. Two-thirds of the jurisdictions that cooperated with GAO in conducting the study were unable to determine the costs of providing written language assistance. *Id*.

48/ *Id*. at 20.

49/ *Id*. The additional costs to the State governments, as a percentage of total election costs, was even smaller. Ten states reported a total cost of $211,000. For six of the states these costs represented only 2.0 percent of the total cost of the election. *Id*. at 22.

50/ *Id*. at 13.

51/ As with the GAO study, MALDEF found that counties have difficulty distinguishing between general election costs and costs associated with language assistance.

52/ There are 27,150 Native American citizens of voting age in Apache County. Bureau of Census, U.S. Department of Commerce.

53/ Bureau of Census data accompanying letter from Robert Kominski, Chief, Education and Social Stratification Branch, Population Division, Bureau of Census, U.S. Department of Commerce to Mario Moreno, Regional Counsel, Mexican American Legal Defense and Educational Fund, August 1991. The Bureau of Census data on English language proficiency from the 1990 Census is not yet available.

54/ Telephone interview with Delora Shreeve, Apache County Recorder's Office (Nov. 27, 1991).

55/ Telephone interview with Cecelia Roberts, Apache County Elections Office (Nov. 26, 1991).

56/ Telephone interview with Cecelia Roberts, Apache County Elections Office (Dec. 9, 1991).

57/ *United States of America v. State of Arizona*, CIV 88-1989 PHX EHC (D. Ariz. consent decree entered May 22, 1989).

58/ Telephone interview with Suzanne Lupke, Apache County Recorder's Office (Dec. 10, 1991).

59/ Telephone interview with Cathy Mitchell, Elections Division, Office of the Secretary of State of California (Dec. 2, 1991).

60/ Telephone interview with Gregory Ridenour, San Francisco County Registrar's Office (Dec. 2, 1991).

Addendum 1

REDRESSING IMPEDIMENTS TO VOTING FACING LANGUAGE MINORITIES: THE NEED TO REAUTHORIZE AND EXPAND SECTION 203 OF THE VOTING RIGHTS ACT

A Report on Behalf of the Mexican-American
Legal Defense and Educational Fund, Inc.
March 4, 1992

Submitted By:

HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

David S. Tatel
John C. Keeney, Jr.
Ignacia Moreno Bish
Melissa R. Jones
Kevin J. Lanigan
Timothy F. Mellett
Sara Slaff
Emily S. Uhrig
Christine A. Varney

Attorneys for the Mexican-American
Legal Defense and Educational
Fund, Inc.

TABLE OF CONTENTS

PAGE

INTRODUCTION AND OVERVIEW 1

I. THE NATURE AND FUNDAMENTAL IMPORTANCE OF THE RIGHT TO VOTE 13

II. SUMMARY OF PAST FINDINGS: THE VIEW IN 1975 -- VOTING ABUSES AGAINST HISPANICS IN THE SOUTHWEST. 19

III. THE VIEW IN 1992 -- IMPEDIMENTS TO VOTING STILL FACED BY LANGUAGE MINORITIES THROUGHOUT THE UNITED STATES 25

A. Continued Discriminatory Barriers in Voting and Elections 26

1. Electoral devices. 27

2. Racial appeals 29

3. Racially polarized voting. 31

B. "English-only" Barriers to Language Minorities' Access to the Ballot. 35

1. The English-only movement. 41

2. The English Language Amendment 46

3. State and local English-only laws. . . . 50

4. Discrimination in the wake of English-only 63

C. Continuing Inequities in the Provision to Members of Language Minority Groups of Educational and Employment Opportunities, Health Care, and Housing Establish Substantial Barriers in Their Own Right to the Effective Exercise of the Franchise . . . 66

1. Education. 68

2. Employment, Housing, and Health. 80

CONCLUSION 85

TABLE OF APPENDICES

APPENDIX

Jurisdictions Covered under the Language Assistance Provisions of the Voting Rights Act of 1965. . . . . . A

Current Status of Voting Rights Act Language Assistance Coverage in Jurisdictions with English-only or Official English Laws. . . . . B

INTRODUCTION AND OVERVIEW

The Mexican-American Legal Defense and Educational Fund ("MALDEF") urges, in the strongest possible terms, that section 203 of the Voting Rights Act of 1965 (the "Act") 1/ be both reauthorized and expanded in coverage prior to its current August 6, 1992 expiration date. One of the two critical language assistance provisions of the Act, 2/ section 203 must

---

1/ Voting Rights of Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, *et seq*.).

2/ The Voting Rights Act has two language minority provisions, sections 4(f)(4) and 203(c), both of which are applied to require the same forms of bilingual assistance. The formula for coverage under section 4(f)(4) (codified at 42 U.S.C. § 1973b(f)) is a static, historical test that turns on conditions that existed in the covered jurisdictions in November 1972. This provision, which does not expire until the year 2007, *see* 42 U.S.C. § 1973b(a)(8), applies to three states in their entirety (Alaska for Alaskan Native voters, and Arizona and Texas for Spanish heritage voters); twelve counties or parts of counties (in California, Florida, Michigan, and New York) for Spanish heritage voters; and seven counties (in Arizona, North Carolina, and South Dakota) for Native American voters. *See* Jurisdictions Covered under the Language Assistance Provisions of the Voting Rights Act of 1965, chart attached as Appendix A hereto, at 1.

Section 203(c) is a much more current test, as it is applied by its term to population characteristics and demographic data developed in the most recent census. *See* 42 U.S.C. § 1973aa-1a(b). As it was applied to 1980 Census data, for example -- final 1990 Census data not yet being available -- section 203(c) has become much more expansive than section 4(f)(4) since it appropriately considers (as section 4(f)(4) by definition cannot) the demographic shifts and immigration trends of the last twenty years. Thus, in addition to "double" covering many of the jurisdictions also covered under section 4(f)(4), *see* Appendix A at 1,

[Footnote continued]

be reauthorized in order to ensure that the right to vote guaranteed to all American citizens can be equally and effectively exercised by citizens who are "language minorities." 3/ Experience has proven -- and Congress already has found -- that voting discrimination against language minorities is "pervasive and national in scope." 4/ When language minorities are denied the ability to exercise effectively their right to vote, they are unable to elect appropriate numbers of their chosen candidates to political office; they are denied a rightful voice in representative

---

2/ [Footnote continued]

section 203(c) covers (again, by applying 1980 Census data) an additional fifty-four counties or parts of counties (in California, Colorado, Connecticut, Florida, Idaho, Massachusetts, Michigan, New Jersey, New Mexico, New York, and Wisconsin) throughout the nation for Spanish language voters; fourteen counties (in Alaska, Montana, New Mexico North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin) for Native American voters; and three Hawaiian counties for Asian American voters. See Appendix A at 2-4. Prior to the 1982 Nickles Amendment, section 203(c) coverage was even broader; the 1982 amendments, however, removed an additional 209 counties or parts of counties from coverage.

3/ The Act and its implementing regulations define "language minority" or "language minority group" as "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." See, e.g., 28 C.F.R. § 55.1 (1991).

4/ See 42 U.S.C. § 1973b(f)(1).

government and they are, consequently, effectively disenfranchised from the political process. 5/

On January 22, 1975, MALDEF submitted to J. Stanley Pottinger, then Assistant Attorney General for the Civil Rights Division of the Department of Justice, a memorandum that documented and analyzed the voting abuses and other impediments to participation in the electoral process experienced by language minorities in parts of the country. 6/ The documented abuses and impediments operated to deprive many thousands of language minorities in this country of their right to vote. It was in order to create and implement an effective remedy for

---

5/ In enacting the language assistance provisions of sections 203 and 4(f)(4) Congress found that "where State and local officials conduct elections only in the English language "citizens of language minorities [are] excluded from participating in the electoral process." *Id*. at § 1973aa-1a(a). Congress also found that the denial of the right to vote is "directly related to the unequal educational opportunities afforded . . . [to language minorities], resulting in high illiteracy and low voting participation." *Id*.

6/ *See* Memorandum from David S. Tatel, Tom Reston, Vilma S. Martinez, Sanford J. Rosen, and Abelardo I. Perez (Attorneys for MALDEF) to Hon. J. Stanley Pottinger (January 22, 1975) (Re: Applicability of Voting Rights Act of 1965 to Texas and Other Areas of the U.S. Southwest Having Large Concentration of Spanish-Speaking Voters) ("1975 MALDEF Impediments Analysis"), *reprinted in Extension of the Voting Rights Act of 1965: Hearings Before the Subcomm. Constitution of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 771-789 (1975).

these abuses and impediments that the 94th Congress later that year enacted the original language assistance amendments to the Voting Rights Act:

> [V]oting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. . . . [W]here State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation.

The co-authors of this compelling declaration of equal voting opportunities were the members of the 94th Congress. 42 U.S.C. § 1973b(f)(1) (congressional findings of voting discrimination against language minorities). On the basis of these findings, Congress determined that the barriers that had been erected between language minority voters and the ballot could not be permitted to stand:

> The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

Id. Unless Congress takes action in the coming months, however, the more expansive of these provisions will lapse.

It has been seventeen years since MALDEF's prior comprehensive analysis of these issues. Discrimination against language minorities, however -- in housing, in employment, in education, as well as directly in the electoral process through the use of English-only elections and otherwise -- still persists. The need to which Congress responded in 1975 is thus no less, and indeed may well be substantially greater, in 1992.

As individual American citizens who are members of language minority groups learn English, their need (on an individual basis) for language assistance in voting naturally diminishes. The existing data on this issue (including census data 7/ and recent studies) indeed show that language

---

7/ For example, testifying before Congress in 1984, Arnoldo S. Torres analyzed the then-available census data as follows:

> A review of the 10 largest cities which have the largest percentage of Hispanics -- San Francisco, Chicago, New York, El Paso, Corpus Christi, Dallas, Albuquerque, Phoenix, Sacramento, San Antonio, and San Diego -- indicate that -- approximately 77.7 percent of the Hispanic households speak only English at home.
>
> A review of another census document . . . indicates that 90.5 percent of persons of Spanish descent age 5 to 17, speak only English at home, persons 18 and over, 88.7 percent; total persons 5 and over, 89.1 percent.

[Footnote continued]

minorities, and specifically Hispanics, are learning English approximately as quickly earlier immigrants. Two oft-cited studies, a 1986 Rand Corporation study by McCarthy and Valdez 8/ and a 1988 study by Veltman, 9/ "show that the rate of English language acquisition by both native-born and immigrant Hispanophones (first language heard is Spanish) is impressive." 10/

7/ [Footnote continued]

See The English Language Amendment: Hearings on S.J. Res. 167 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 152, 154 (1984) (Statement of Arnoldo S. Torres, Executive Director of the League of United Latin American Citizens ("LULAC")). See also Bureau of Census, U.S. Dep't of Commerce, 1980 Census of Population: General Social and Economic Characteristics, Table 99, Nativity and Language 1-68 (1983).

8/ K. McCarthy & R. Burchiaga Valdez, Current and Future Effects of Mexican Immigration in California (1986).

9/ C. Veltman, The Future of Spanish Language in the United States (1988).

10/ A. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 Harv. C.R.-C.L. L. Rev. 293, 314 (1989). These studies should also provide reassurance to those who might otherwise be concerned that language assistance in voting and bilingual education serves to deter the acquisition of fluency in English:

> The McCarthy and Valdez Study showed that the classic three-generation model of language acquisition is present for Hispanics. According to this model, the

[Footnote continued]

Notwithstanding this natural progression of most American citizens toward fluency in English, however, the

---

10/ [Footnote continued]

> first generation is mainly monolingual in Spanish. The second generation is bilingual with working knowledge in both the native language and English, the language of the adopted country. By the third generation, English is the preferred language. This is the pattern previous immigrants followed and seems to be applicable to Mexican-Americans in California as well.
>
> The Veltman Study explored the language practices of all Hispanics. Veltman found that the acquisition of English by Hispanic immigrants is primarily determined by two factors: (1) how long the immigrant has lived in the United States and (2) how old the immigrant was when she arrived in the United States. Older teenagers and adults do not transfer to English as quickly as do younger immigrants. Nevertheless, the language shift of immigrants begins immediately upon arrival in the United States, progresses rapidly, and ends within approximately fifteen years. The Veltman Study concluded that Hispanic immigrants rapidly shift to the English language. The language shift from Spanish to English currently spans between two and three generations, with a two-generation model more likely in the future. Eventually, 52% of Hispanophones will adopt English as their principal language. Of the remainder, 39.7% will be Spanish bilingual. Spanish monolinguals comprise 8.3% of the native-born Hispanophone population.

Id. at 314-16 (citations omitted). In contrast to these

[Footnote continued]

extent of the need for language assistance in voting may well be even greater today than in 1975. 11/ This increased need is

---

10/ [Footnote continued]

empirical studies, there is absolutely no evidence -- empirical, anecdotal, or otherwise -- to support the complaint that the provision of language assistance in voting somehow "hinders the progress of certain ethnic groups" in acquiring fluency in English. See Statement of P. George Tryfiates before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Hearing on Voting Rights Act Language Assistance Amendments of 1992 (February 26, 1992) ("Tryfiates Statement"), at 3. To the extent that a 1990 Houston Chronicle poll determined, for example, that 87% of Hispanics surveyed thought it their "duty to learn English," see id., such a sentiment among members of a language minority group in a state that since 1975 has been required to provide language assistance to Spanish heritage voters makes crystal clear that that assistance has in no significant respect decreased their own perceived need and determination to learn English.

11/ For example,

> [C]lose to 70% of the Asian American population is foreign born and has limited English proficiency. The language barrier is one of the single largest detriments preventing Asian Americans from registering and participating in the electoral process . . . . [S]urveys undertaken by the Asian American Legal Defense and Education Fund ("AALDEF") in New York in 1990 show that more Asian American voters would vote if more assistance were available. According the Margaret Fung, executive director of AALDEF, "In Chinatown, four out of five voters have language difficulties. These voters stated . . . that they would vote more often if bilingual assistance were provided. Similarly in Queens, four out of every five limited-English-proficient Asian

[Footnote continued]

a product, in the final analysis, of immigration patterns and simple demographics. Data from the 1990 Census indicate that a high level of immigration has made Asians and Hispanics the fastest growing minority populations in the United States. 12/ Native Americans have also experienced significant gains in population in the last decade. 13/

According to a census profile published by the U.S. Department of Commerce in June 1991, the Hispanic origin population in the United States has increased by 53 percent since the 1980 Census, from 14.6 million to 22.4 million. 14/ The number of persons identifying themselves as Asian or Pacific Islanders has increased by 108 percent, from 3.5

11/ [Footnote continued]

> American voters indicated that they would vote more if bilingual assistance were provided."

Statement of Charles Pei Wang, Vice Chair, U.S. Commission on Civil Rights, before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Hearing on Voting Rights Act Language Assistance Amendments of 1992 (February 26, 1992) ("Wang Statement"), at 4-5.

12/ *See* Economics and Statistics Administration, Bureau of the Census, U.S. Dep't of Commerce, *1990 Census Profile: Race and Hispanic Origin* 1 ("1990 Census Profile") (June 1991).

13/ *See id*.

14/ *Id*.

million in 1980 to 7.3 million in 1990. 15/ These figures reflect a "profile of an increasingly multicultural society, with virtually every corner of the nation drawing [the immigration of] Asians and Hispanics from a range of different national backgrounds." 16/

The Native American population, which includes Alaskan Natives (Eskimos and Aleuts), has increased by 38 percent, from 1.4 million to nearly 2 million. 17/ Taken together, these figures represent a nationwide percentage increase of Hispanics, Asians, and Native Americans in the total population of the United States since 1980 from 6.4 percent to 9.0 percent, 1.5 percent to 2.9 percent and 0.6 to 0.8 percent, respectively. 18/

These increases call for even greater vigilance to ensure that members of language minority groups, once they attain citizenship, gain the fullest possible access to our democratic processes. For a decade-and-a-half, the Act's

---

15/ *Id*.

16/ Vobejda, *Asians, Hispanics Giving Nation More Diversity*, Wash. Post, June 12, 1991, at A3.

17/ 1990 Census Profile at 1. Nationwide, "Eskimos (57,000) and Aleuts (24,000) together represented 4.1 percent of the combined American Indian, Eskimo, or Aleut population in 1990." *Id*. at 6, n.3.

18/ *Id*. at 2, Figure 2.

language assistance provisions have contributed significantly to the realization of this goal, 19/ and it is vital that they continue to do so in the future.

19/ As MALDEF noted in 1975, "When minority voters are denied access to the ballot box, they are denied the chance to elect members of their own groups to political office." 1975 MALDEF Impediments Analysis, supra note 6, at 773. With the benefit of language assistance for voters not fluent in English, language minority groups in covered jurisdictions are every year registering important, if gradual, gains, as the Justice Department official currently charged with enforcing voting rights has himself noted: "There is every reason to believe that section 203 has made a difference. Both rates of voter registration and actual participation in elections by minorities language individuals have increased since section 203 was enacted." Statement of Hon. John R. Dunne, Assistant Attorney General, Civil Rights Division, Department of Justice, before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Hearing on Voting Rights Act Language Assistance Amendments of 1992 (February 26, 1992) ("Dunne Statement"), at 8.

For example, in a 1991 special election, Arizona (which is covered statewide for Spanish heritage voters under section 4(f)(4), and separately covered under section 203 for Spanish heritage voters in most of the state's rural counties) elected the first Hispanic congressman in the state's history, Ed Pastor. There is still far to go, however. Of the nearly half million local elected officials in this country in 1987 (including counties, cities and towns, and school and special districts) only .41% were Native American (i.e., only about one-half of the Native American .8% proportion of the overall population); only 1.12% were Hispanic (about one-eighth of the Hispanic 9.0% proportion of the population); and only .08% were Asian American (only one-thirty-sixth of the Asian American 2.9% proportion of the population). See U.S. Dep't of Commerce, 1987 Census of Governments, Volume 1, Number 2: Government Organization/Popularly Elected Officials xiii (1990).

This Memorandum is submitted on behalf of MALDEF to assist Congress in fulfilling its responsibility to safeguard and expand effective access to the franchise of the country's language minority citizens. Section I of the Memorandum reviews the historic commitment of this nation to tolerance and to pluralism, the relationship between those principles and the safeguarding of the fundamental right to vote. In Section II, a brief overview is provided of the legacy of discrimination that gave rise in 1975 to the initial enactment by Congress of the language assistance provisions. Section III documents that the obstacles and pervasive discrimination that effectively barred language minorities from the vote in 1975 still do so to this day. Indeed, barriers to voting today in certain respects may be even more formidable than in 1975, due to, inter alia, the ascendency of the English-only movement and the enactment over the last decade of "official English" and "English-only" laws throughout the country.

I. THE NATURE AND FUNDAMENTAL IMPORTANCE OF THE RIGHT TO VOTE

The right to vote is guaranteed to all citizens of the United States, 20/ and the United States Supreme Court has long held that the right to vote is a "fundamental" right. 21/ Implicit in the right to vote is the right to cast an informed and "effective" vote. 22/ The Supreme Court has recognized

---

20/ The Fifteenth Amendment to the U.S. Constitution states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race [or] color . . . ." U.S. Const. amend XV, § 1. The Fifteenth Amendment is self-executing and has been often relied upon by the United States Supreme Court, in conjunction with the Fourteenth Amendment, to overturn discriminatory voting practices. *See* D. Klein, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation -- Supreme Court Cases*, 92 L. Ed.2d 809, 811 (1986).

21/ *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is a fundamental right because it is "preservative of all rights"); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .")

22/ *See, e.g.*, *Garza v. Smith*, 320 F. Supp. 131, 136 (W.D. Texas 1970), *vacated and remanded for appeal to the Fifth Circuit*, 401 U.S. 1006 (1971), *appeal dismissed for lack of jurisdiction*, 450 F.2d 790 (5th Cir. 1971) ("[T]he 'right to vote' additionally includes the right to be informed as to which mark on the ballot, or lever on the voting machine, will effectuate the voter's political choice."); *Arroyo v. Tucker*, 372 F. Supp. 764, 767 (E.D. Pa. 1974) (The "'right to vote' means more than the mechanics of marking a ballot or pulling a

[Footnote continued]

that prior to the enactment of the Voting Rights Act of 1965, as amended:

> [T]he individual has certain fundamental rights which must be respected. *The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue*. [A] ready understanding of our ordinary speech . . . cannot be coerced by methods which conflict with the

---

22/ [Footnote continued]

lever. Here, plaintiffs [non-English speaking Puerto Ricans] cannot cast an 'informed' or 'effective' vote without demonstrating an ability to comprehend the registration and election forms and the ballot itself. The English-only election materials therefore constitute a device 'conditioning the right to vote' . . . on [the voter's] ability to 'read, write, understand, or interpret any matter in the English language.'") (citations omitted); *Torres v. Sachs*, 381 F. Supp. 309, 312 (S.D.N.Y. 1974) ("In order that the phrase 'the right to vote' be more than an empty platitude, a voter must be able effectively to register his or her political choice . . . . It is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired."); *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) (The Seventh Circuit agreed that "the 'right to vote' encompasses the right to an effective vote. If a person who cannot read English is entitled to oral assistance, if a Negro is entitled to correction of erroneous instructions, so a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or understand.") These and other pre-1975 decisions were discussed at greater length in the 1975 MALDEF Impediments Analysis, at 775-79.

> Constitution--a desirable end cannot be promoted by prohibited means. 23/

Notwithstanding the protections of the Fourteenth and Fifteenth Amendments, 24/ the U.S. Commission on Civil Rights noted in a 1981 report entitled The Voting Rights Act: Unfulfilled Goals that prior to the Act's enactment:

> pervasive racial discrimination continued to thwart the guarantees of the 15th amendment. Numerous practices were used to deny minority citizens the right to vote, including physical intimidation and harassment, the use of literacy tests, the poll tax, English-only elections, and racial gerrymandering. The results of these practices were low registration and voter turnout among minorities when compared with whites and the absence of a significant number of minority elected officials. In many areas, minorities were almost totally excluded from the political process. 25/

23/ Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (striking down a Nebraska statute which prohibited the teaching of any subject in a foreign language before the completion of the eighth grade) (emphasis added).

24/ See supra note 20.

25/ U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals 1 (September 1981) (citations omitted). At the February 26, 1992 hearing before the Senate Judiciary Committee's Subcommittee on the Constitution, the director of English First, see infra note 68, stated his organization's opposition to reauthorization of section 203 on the asserted basis that language assistance is a "perversion" of the original intent of the Voting Rights Act, which he claimed was not intended to address discrimination against persons on the basis of characteristics that were "not immutable," such as the ability to understand English. See Tryfiates Statement, supra

[Footnote continued]

Some of these abuses -- including primarily the continued use of English-only elections in jurisdictions not covered by the Act's language assistance provisions, or the less-than-enthusiastic implementation of minimal language assistance provisions in covered jurisdictions -- continue to detract from the rights of American citizens whose fluency and education are in languages other than English.

Although English is considered by many Americans to be the national language, the United States does not in fact have an official language -- no more than it has a state religion. 26/ This is no mere oversight, but rather is reflective of an affirmative philosophy that tolerance is more consistent with this nation's republican spirit, as opposed to the intolerance that characterized many of the nations and societies that prompted much of the immigration to these

---

25/ [Footnote continued]

note 10, at 1. As the original Voting Rights Act, however, directly and expressly operated in 1965 to dismantle such impediments to voting as poll taxes and English literacy tests, and as neither wealth nor illiteracy are any more inherently "immutable" than is a lack of fluency in the English language, English First's analysis wholly misconstrues the intent and the operation of the Voting Rights Act.

26/ See Califa, supra note 10, at 293 ("Two out of three Americans believe that English is the official language of the U.S." (citing Carelli, Survey: Most Think English is the Official U.S. Language, Assoc. Press, Feb. 14, 1987)).

shores. In expressly rejecting the adoption of an official language as undemocratic and divisive, the Framers of the Constitution "believed that leaving language to individual choice was in keeping with the notions of individual freedom upon which the country was founded." 27/ According to one noted historian, the country's early political leaders recognized the "close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on those freedoms." 28/ The Framers correctly concluded that, in time, the ascendancy of English would be widely accepted -- as it indeed is today -- and that serious resistance could be provoked only if government sought to limit or require the abandonment of the usage of native languages by minority groups. 29/

27/ V. Lexicon, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 Hastings Const'l L.Q. 657, 658-59 (1987) (citing Marshall, *The Question of an Official Language: Language Rights and the English Language Amendment*, 60 Int'l. J. Soc. Lang. 8, 11 (1986)).

28/ Heath, "Language and Politics in the United States," *Linguistics and Anthropology* 267, 270 (M. Saville-Troike ed. 1972).

29/ *Id*. Suggestions made by opponents of language assistance in voting that such assistance will ultimately cause "strife" in this country on the order of the Quebec separatist movement

[Footnote continued]

Not until the mid-to-late nineteenth century was there any real controversy over the toleration of multilingualism in the United States. 30/ Beginning with the Know-Nothing movement in the 1840s and proceeding to the English-Only movement of today, a "pull the ladder up" mentality has been vigorously espoused by an intolerant and vocal nativist minority, who perceive a need to combat so-called "foreign" influences whenever such influences appear. Before the Civil War, it was primarily the Irish (among white Europeans) who were victimized by this ideology -- as well as Native Americans throughout the country and Mexican-Americans in the

---

29/ [Footnote continued]

or even the tragic civil war in Yugoslavia, see Tryfiates Statement, supra note 10, at 1, are hysterical nonsense. Language assistance has been mandated in the Voting Rights Act for seventeen years, and has been offered elsewhere (such as in New Mexico) for far longer than that, with absolutely no such evidence of "dangerous divisiveness."

30/ M. Arington, Note, English-Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights, VII J.L. & Politics 325, 329-30 (1991) (Since the founding of this country, the United States has been a nation of "multilingual cultures -- from the French who settled in Louisiana to the Germans in Pennsylvania; from the Spanish in Florida, Texas, and California to the Native Americans of the territories." Id. at 329. "Before Europeans came to North America, the continent was populated by native peoples who spoke hundreds of distinct languages. Even after the European colonists arrived, Spanish, French, German, Dutch, and Swedish all served as official languages in various regions of the United States before English finally predominated." Id. at 329-30 n.31) (citations omitted).

newly-founded republic, and later the state, of Texas. Today it is the Vietnamese, Hmongs, El Salvadorans, Nicaraguans, and other new arrivals throughout the country who are victimized -- together with, even still, Native Americans and later-generation Hispanics throughout the country.

Congressional adoption in 1975 of the Act's language assistance provisions represented a positive affirmation of the principles of toleration with which this country was founded. Reauthorization of these provisions in 1992 would be a vital and necessary reaffirmation of these same principles, and a meaningful and effective guarantee to all citizens of the fundamental right to vote.

II. SUMMARY OF PAST FINDINGS: THE VIEW IN 1975 -- VOTING ABUSES AGAINST HISPANICS IN THE SOUTHWEST

The 1975 MALDEF Impediments Analysis described the substantial barriers facing Spanish-speaking citizens aspiring to exercise their right to vote. In order to redress these impediments, Congress extended coverage of the Act to language minorities. Without belaboring MALDEF's prior submission, its main conclusions bear reiteration here, to establish a point of departure for comparison with present circumstances.

In 1975, Spanish-speaking Americans faced a substantial number of impediments with respect to the right to vote. Over six million Spanish-speaking Mexican-American people were living in the United States. 31/ Many were poor, illiterate in English, and subject to a number of discriminatory laws and practices which served to deny equal opportunities in housing, employment, education, and voting. 32/ Indeed, there was evidence that Spanish-speaking Mexican-Americans in the Southwest were as effectively denied the right to vote just as African-Americans living in the South had been denied the right to vote prior to passage of the Voting Rights Act in 1965. 33/

The Act had been passed by Congress in 1965 to redress a general pattern of circumstances that had resulted in a substantial non-white voting age population, a high percentage of white registration, a low percentage of non-white

---

31/ See 1975 MALDEF Impediments Analysis, supra note 6, at 772. The "vast majority" of this population lived in the five Southwestern states of Texas, New Mexico, Arizona, Colorado, and California. Id. While these five states continue to be home to 61% of the nation's Hispanics and an even greater proportion of its Mexican-American population, 15% of the nation's Hispanic population (more than 3.2 million, primarily of Puerto Rican origin) today lives in the states of New York, New Jersey, and Massachusetts; 7% (nearly 1.6 million, primarily of Cuban origin) lives in Florida; and 4% of (more than 900,000) lives in Illinois, primarily in the Chicago (Cook County) area. See U.S. Bureau of the Census, Current Population Survey (1990).

32/ See 1975 MALDEF Impediments Analysis, supra note 6, at 772.

33/ See id. at 772-73, 775.

registration, a low voter turnout in the presidential election of 1964, and the use of a "test or device" interfering with the exercise of a citizen's right to vote. 34/

In its 1975 impediments analysis, MALDEF presented evidence indicating that a similar situation with respect to voter registration and turnout prevailed in the Southwest between whites and Hispanics. That is, under-registration and low voter turnout were similarly pervasive among Hispanics and they were attributable to various obstacles erected through official and private actions. As a result, a disproportionately low percentage of Hispanic persons were being appointed or elected to local, state, and federal offices. 35/

Another obstacle documented in the 1975 MALDEF Impediments Analysis was the discriminatory application of

---

34/ See id. (citing S. Rep. No. 162, 89th Cong., 1st Sess. (1965), 1965 U.S.C.C.A.N. 2552).

35/ See id. at 772-73. For example, in 1970, statistics indicated that although 18.8% of the total state population in California was comprised of Mexican-Americans, only 1.98% of all government positions in that state were held by Mexican-Americans. Similarly, although each congressman in California represented approximately 480,000 people, the 3.8 million Mexican-American people in the state had elected only one congressman. See id. (citing Mexican American Population Committee of California, Mexican American Population in California (June 1973) at 7; see also 1970 California Roster of Federal, State, County and City Officials).

registration and electoral procedures to language minoritie A 1974 unpublished field study on the U.S. Commission on Ci Rights of voting abuses directed against Hispanics in Uvalde County, Texas, cited in the MALDEF impediments analysis, indicated, among other things, that:

- Properly registered Hispanic voters were not placed on the voting lists;
- Election judges selectively invalidated ballots cast by minority voters and refused to assist minority voters who were illiterate in English; and
- The county tax assessor who, under Texas law, was responsible for registering voters, refused to name members of minority groups as deputy registrars and refused as well to register voter applicants based upon the technicality that the application was filed on a printed card bearing a previous year's date; and repeatedly "ran out" of registration application cards when minority voter applicants asked for them. 36/

36/ *See id.* at 773-74. Additional abuses were discovered by the Commission in Uvalde County as well as elsewhere in Texas, such as widespread gerrymandering focused on diluting minority voting strength; systematic drawing of at-large electoral districts with the same purpose and design as the gerrymandering; maintenance of polling places only in places that were inaccessible to minority voters; excessive filing fees required in order to run for political office; and numbered paper ballots which needed to be signed by the voter, thus compromising the anonymity of the voting process. Economic threats and coercion directed at citizens who became involved with insurgent political forces were also uncovered. Indeed, a frequent reason expressed by interviewees for low

[Footnote continued]

Abuses against Hispanics, including those documented in Uvalde County, existed throughout the Southwest. Cases such as Graves v. Barnes 37/ acknowledged the history and tradition of invidious discrimination directed against Mexican-Americans in Texas. The court in Graves noted that the "cultural and language impediment, conjoined with the poll tax and the most restrictive voter registration procedures in the nation . . . operated to effectively deny Mexican-Americans access to the political processes." 38/ By enacting the language assistance provisions, Congress finally recognized in 1975 that such practices as these required specific remedies.

Finally, the MALDEF analysis also noted that the practice of certain Southwestern states, such as Texas, of printing all their registration and electoral materials only in

---

36/ [Footnote continued]

voter registration and turnout was fear of economic reprisal for involvement in the political process. The study also revealed that the Uvalde County school system actually fired Hispanic teachers who attempted to run for political office. See id. at 774.

37/ 343 F. Supp. 704 (W.D. Tex. 1972) (mandating single-member districts for Bexar County, Texas, to remedy victimization of Hispanics by long-standing state policies that had both the design and effect of discrimination).

38/ Id. at 731. The court further noted that this cultural incompatibility was fueled by a deficient educational system. See id.; see also infra pp. 68-72.

English impaired the right of citizens who were not fully illiterate in English to cast an effective ballot, just as Southern literacy tests had denied the right to vote to illiterate African American. 39/ MALDEF observed that numerous courts had already held that English-only election materials constitute a device which conditions the right to vote on a citizen's ability to read, write, and understand the English language. 40/ Accordingly, MALDEF pointed out that English-only elections could be considered (and accordingly be banned as) "devices" within the meaning of section 4(b) of the Act, and thus trigger the protections of section 5 wherever a substantial number of Spanish-speaking voters reside. The MALDEF impediments analysis further concluded that, because an English-only election creates the same result as a literacy test, the statutory consequences likewise should be the same. 41/ The language assistance provisions enacted by Congress later that year effectively accomplished this result, at least for language minorities comprising a sufficient

---

39/ *See* 1975 MALDEF Impediments Analysis, *supra* note 6, at 775-78.

40/ *See id*.

41/ *See id*. at 779.

"critical share" of the population of a political subdivision to trigger coverage by section 203. 42/

III. THE VIEW IN 1992: IMPEDIMENTS TO VOTING STILL FACED BY LANGUAGE MINORITIES THROUGHOUT THE UNITED STATES

Since MALDEF's 1975 impediments analysis, the legacy and continuing character of the invidious nationwide discrimination directed against language minorities in voting (or having an effect on voting) prior to and during the 1970s, 1980s and 1990s, has been further documented through various studies; evidence presented to Congress, including in evidence presented in connection with adoption of the 1982 amendments to the Act; and in numerous judicial decisions in which courts adjudicated, *inter alia*, violations of section 2 of the Act. 43/ The continued relevance of, and need for, language assistance in voting is made clear by even a cursory review of this evidence.

42/ Thus, it is important in this respect to note that, even prior to the 1982 Nickles Amendment's severe restriction on section 203 coverage, the coverage afforded by Act's language assistance provisions is a "half a loaf" compromise approach. Regrettably, the language assistance provisions have never unlike the ban on, for example, literacy tests or poll taxes, attained the ideal of safeguarding the individual right of each language minority person to vote, no matter where he or she resides. *See supra* note 2.

43/ *See* 42 U.S.C. § 1973(a)-(b).

A. Continued Discriminatory Barriers in Voting and Elections

In 1975, there had been relatively few reported judicial decisions under the Voting Rights Act analyzing the impact of various discriminatory practices upon voting members of language minority groups. The best known of these cases involved, primarily, Hispanics in Texas. In the last decade-and-a-half, many more Voting Rights Act cases have been adjudicated throughout the country. 44/ These cases are reflective both of the fact that much *has* been accomplished to date, as well as that many barriers to voting throughout this country affecting language minority groups survived the

---

44/ Indeed, in 1985, a federal court in New York trenchantly observed that, "[c]ontrary to the popularly held belief that racial discrimination only takes place within the Fifth and Eleventh Circuits" -- that is, the states of the old Confederacy -- "Hispanic voters in New York City have been the subject of various procedures and/or statutes in the recent past which have had the effect of abridging their voting rights." *Butts v. City of New York*, 614 F. Supp. 1527, 1544 (S.D.N.Y.), *rev'd on other grounds*, 779 F.2d 141 (1985), *cert. denied*, 478 U.S. 1021 (1986). Most of the section 2 cases litigated since 1975 and involving members of language minority groups still have addressed the rights of Hispanic voters, rather than the rights of members of other language minority groups. This by no means suggests that Asian Americans and Native Americans are any less disadvantaged by discriminatory barriers, but rather that they simply lack, in many instances, sufficient numbers in the relevant political jurisdiction to make out colorable section 2 claims. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (requiring, *inter alia*, proof of a "sufficiently large and geographically compact" minority group "to constitute a majority in a single-member district").

enactment of the 1975 and 1982 amendments to the Act. Among these barriers to voting are those summarized below.

1. Electoral devices

Jurisdictions throughout the country do indeed continue to employ practices or utilize devices that have the effect -- no doubt intentionally, in more instances than are admitted or can be proven -- of erecting or maintaining very real and significant barriers to the free and equal exercise of the right to vote by members of language minority groups. As recently as 1990, for example, a federal court in California found that one of the most populous counties in the nation was still governed by an all-white county board whose district lines had been *intentionally* drawn in 1981 to fragment, or "crack," the Hispanic population in order to "further impair the ability of Hispanics to gain representation on the Board." 45/ Juxtaposed to the discriminatory practice of "cracking" is that of "packing" -- *i.e.*, gerrymandering electoral districts to put the *greatest* number of minority voters (far more in fact than are necessary to elect minority

---

45/ *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1318 (C.D. Cal.), *aff'd*, 918 F. 2d 763, 7761 (9th Cir. 1990), *cert.* denied ___ U.S. ____, 111 S. Ct. 681 (1991). *See also Ketchum v. Byrne*, 740 F.2d 1398, 1409 (7th Cir. 1984), *cert. denied sub nom.*, *City Council of the City of Chicago v. Ketchum*, 471 U.S. 1135 (1985) (describing similar fragmentation of the Hispanic community in Chicago).

representatives) into the fewest number of electoral districts possible, thus containing the potential extent of minority electoral success. 46/

By far the most widely-utilized practice or device that still looms as a barrier to the attainment by minority and language minority voters of an equal opportunity to elect the representatives of their choice, is the at-large or multi-member electoral district. Such a system "aggravates the political disadvantages of the City's minorities. Even under the best of circumstances, at-large districts tend to debase the value of a minority's political strength." 47/ An effective at-large election campaign inherently costs far more than a single-member district race that would, by definition, cover only a fraction of the electorate within the at-large jurisdiction; frequently there is substantial economic disparity between language minority groups and the Anglo

---

46/ See e.g., Williams v. City of Dallas, 734 F. Supp. 1317, 1380-81 (N.D. Tex. 1990) (packing Hispanic voters into a single city council district).

47/ Jones v. City of Lubbock, 727 F.2d 364, 383 (5th Cir. 1984) (citing Whitcomb v. Chavis, 403 U.S. 124, 159 (1971)). See also Gomez v. City of Watsonville, 863 F.2d 1407, 1417 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989); Campos v. City of Baytown, 840 F.2d 1240, 1249 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989); League of United Latin American Citizens, Council No. 4386 v. Midland Independent School District, 812 F.2d 1494, 1502 (5th Cir. 1987).

majority. 48/ Thus, if sufficient funds do not exist in the minority community and cannot be raised in the Anglo community, the candidate of a language minority group may not even be able to wage a credible campaign for an at-large seat in a sizeable metropolitan area that would require, as a practical matter, substantial mass media expenditures in order to win election. 49/

2. **Racial appeals**

Candidates for office who are members of language minority groups also continue to be the targets of racist campaign tactics. In Garza v. County of Los Angeles, for example, the court found "substantial evidence of racial appeals in elections at all levels within the County." 50/ At the other end of the country, the court in Butts v. City of New

---

48/ See Williams v. City of Dallas, 734 F. Supp. at 1381-83.

49/ See id.

50/ 756 F. Supp. at 1341. One so-called "subtle" approach of some Anglo candidates was to include photographs of their minority opponents in their own literature, in order to make absolutely certain that the anglo voters in the County would know which of the candidates were Anglo, and which were not. See id.

York related a similarly remarkable, and unfortunately not rare, description of racially slanted campaign tactics employed in a runoff Democratic primary race:

> [C]ampaign literature was distributed containing overt and subtle appeals to racial prejudice. Two of these [trial] exhibits featured statements such as "Save New York City" or "Last Chance to Save New York City." As Mr. Badillo [the Hispanic runoff candidate] was asked during trial examination, the obvious question is "Save New York City from what?"
>
> > "This is not just an appeal to vote the one fellow against the other. This is put on the basis of saving the City of New York. Saving it from what? Saving it from whom? Saving it from Hispanics and Blacks. That was the message that was used." (Tr. 99).
>
> According to plaintiffs' tally, the racial appeals worked successfully to defeat Mr. Badillo's nomination, by causing a large turnout of White voters who had not participated in the initial primary, but were affected by last minute appeals to vote against the minority candidate[.] 51/

Where such tactics are utilized with effective, the efforts of the chosen candidates of language minority groups to win election to office can only be made more difficult. These difficulties is compounded where a substantial segment of the language minority population is effectively excluded from voting due to the absence of effective language assistance measures.

51/ 614 F. Supp. at 1545.

3. Racially polarized voting

Finally, language minority groups, time after time, are subjected to and defeated by racially polarized (or "bloc") voting in elections by Anglo majorities. Bloc voting, of course, is often guided by the racial appeals of candidates or political parties, or influenced by various sorts of "officially"-sanctioned discrimination, and as such may itself under certain circumstances be properly viewed as unlawful "state" action. 52/ Even where bloc voting is entirely a manifestation of private decisions by individual voters, however, Congress has seen fit in the Voting Rights Act to devise measures to allow language minority voters to overcome hostile bloc voting -- regardless of intent -- and secure an equal opportunity to elect the representatives of their choice. 53/ Again, as with discriminatory electoral devices

---

52/ See, e.g., Jenkins v. Missouri, 593 F. Supp. 1485, 1503 (W.D. Mo. 1984) ("private action may, in law, become state action when the state has . . .provided significant encouragement for the private discriminatory activity").

53/ See, e.g., Meek v. Metropolitan Dade County, 908 F.2d 1540, 1547 (11th Cir. 1990), cert. denied, 111 S.Ct. 1108 (1991) (Hispanic voters in Dade County, Florida, "usually are denied the opportunity to elect their preferred representatives because of an opposing voting bloc"); Gomez v. City of Watsonville, 863 F.2d at 1417 ("it is clear that the non-Hispanic majority in Watsonville [California] usually votes sufficiently as a bloc to defeat the minority votes");

[Footnote continued]

and racial campaign appeals, the relevance of bloc voting to the question of language assistance reauthorization is that bloc voting constitutes a very real impediment the ability of members of language minority groups to elect the representatives of their choice. These impediments can be ameliorated by offering effective assistance in voting to language minority voters, or they can be aggravated by denying such language assistance, and consequently lessening the participation of language minority citizens in the political process.

If section 2 is the cornerstone of the Act's substantive protections for all minorities, the Act's

---

53/ [Footnote continued]

Campos v. City of Baytown, 840 F.2d at 1249 ("white bloc voting usually defeats" Hispanic candidates in Baytown, Texas); League of United Latin American Citizens, Council No. 4386, 812 F.2d at 1502 ("the bloc voting of the [white] majority was in fact able to defeat" The Hispanic voters' candidates]; Jones v. City of Lubbock, 727 F.2d at 381 (continued polarized voting "confirms that race, at least subtly, remains at issue in the political system"); Garza v. County of Los Angeles, 756 F. Supp. at 1337 (detailing bloc voting that operated to defeat Hispanic candidates); Williams v. City of Dallas, 734 F. Supp. at 1381 (finding that, in the face of white bloc voting, it was not possible for a Hispanic candidate to win an at-large city council seat in Dallas, Texas against any "serious" white opponent); Latino Political Action Committee, Inc., v. City of Boston, 609 F. Supp. 739, 745 (D. Mass. 1985), aff'd, 784 F.2d 409 (1st Cir. 1986) ("racial polarization continues to characterize Boston's electorate[,]" including against Hispanic candidates).

keystone -- for language minorities -- is section 203's language assistance provisions. 54/ The resources of the Department of Justice and the federal courts that are devoted every day to dismantling the overt barriers of the sort described above 55/ are necessarily frustrated where

---

54/ The U.S. Commission on Civil Rights, for example, has noted that -- together with census undercount problems, the utilization of electoral devices (such as at-large elections), and anti-Asian sentiments among non-Asian voters and the media -- one of the most significant factors limiting Asian American political participation and representation is the widespread "unavailability of Asian language ballots and other election materials." Wang Statement, supra note 11, at 4 (citing U.S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s ch. 7 (1992))

55/ In testimony before the Senate Judiciary Committee's Subcommittee on the Constitution, for example, John R. Dunne, Assistant Attorney General of the Civil Rights Division of the Department of Justice stated in pertinent part:

> The Department has sent out large numbers of federal monitors and has had to file five lawsuits to force compliance with section 203. All have been resolved successfully through consent decrees.
>
> Four of our enforcement suits have addressed the problems of Native Americans in six counties in two southwestern states (New Mexico and Utah). Each of these counties has large numbers of Navajo or Pueblo Indians with limited abilities in the English language and limited familiarity with many of the concepts required to be an effective voter. These counties had not taken the initiative to identify the barriers that were preventing

[Footnote continued]

significant elements of the nation's language minority communities still are effectively disenfranchised by a lack of

---

55/ [Footnote continued]

> full participation by Navajo or Pueblo Indians or to devise programs that would provide a realistic opportunity for full enfranchisement. The consent decrees we negotiated under section 203, and which we continue to monitor and update as necessary, for the first time provide an effective mechanism to enable the Native American population in these counties to enter the electoral mainstream. The jurisdictions included in these lawsuits would no longer be required to provide language assistance if section 203 were not renewed.
>
> * * *
>
> Since 1975, federal observes, where other provisions of the Voting Rights Act allow, have monitored 18 different elections to determine the extent to which language minority citizens were able to receive materials, instructions, and assistance in minority languages. A total of 1,154 federal observes have served in this effort so far. They have been sent to eleven different counties in six states -- Arizona, California, New Mexico, New York, Texas, and Utah -- and have monitored the treatment of Native American voters, Hispanic voters, and Chinese American voters.
>
> [The Department of Justice] can safely conclude from our experience in these various states and counties that there are many citizens whose limited ability in the English language seriously compromises

[Footnote continued]

fluency in English.

Language assistance thus remains a critical component of the Act's interlocking remedies, in order to ensure that all citizens truly have an equal opportunity to vote and to have their votes count equally.

B. "English-only" Barriers to Language Minorities' Access to the Ballot

In 1975, MALDEF analyzed several cases in which the courts had found English-only elections to unlawfully discriminate against American citizens fluent in languages other than English. In one of these cases, the court eloquently and concisely stated the case for language assistance:

> We decide . . . that the 'right to vote' additionally includes the right to be informed as to which mark on the ballot, or lever on the voting machine, will effectuate the voter's political choice . . . . [The voter not fluent and literate in English is] just as surely disabled as the blind or physically incapacitated voter, and

---

55/ [Footnote continued]

> their ability to participate in the electoral process on an equal basis with other voters. We also can conclude that providing bilingual materials, instruction, and assistance make a real difference for minority language voters with limited English language abilities.

Dunne Statement, *supra* note 19, at 5-6, 7-8.

> therefore in equal need of
> assistance 56/

Notwithstanding this compelling logic, Texas and other Southwestern states in 1975 printed all of their registration and election materials only in the English language. 57/ In jurisdictions where language minority voters reside in any

---

56/ *Garza v. Smith*, 320 F. Supp. at 136-37. *See also Arroyo v. Tucker*, 372 F. Supp. at 767; *Torres v. Sachs*, 381 F. Supp. at 312; *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d at 580.

57/ *See* 1975 MALDEF Impediments Analysis, *supra* note 6, at 775. In fact, just over a year ago in *Garza v. County of Los Angeles*, the court noted that, in 1962, there were actually nineteen states (including California) which made English language literacy a prerequisite for voting. 756 F. Supp. at 1340. The court went on to describe the discriminatory impetus of the literacy requirement in California:

> In 1970, the California Supreme Court held that Article II, Section 1 of the Constitution of California violated the equal protection clause of the Fourteenth Amendment by conditioning the right of persons otherwise qualified to vote upon the ability to read the English language. The Court found no compelling state interest in "denying the vote to a group of . . . citizens who already face similar problems of discrimination and exclusion in other areas and need a political voice if they are to have any realistic hope of ameliorating the conditions in which they live. . . . [F]ear and hatred played a significant role in the passage of the literacy requirement."

Id. (citations omitted).

substantial numbers, such a "test" constitutes the functional equivalent of maintaining an English language literacy "test" as a prerequisite to voting.

The latest wave of Asian and Hispanic immigrants apparently has proven disconcerting to some, who perceive an increase in such immigrant populations as a "threat to 'United States culture' and to the English language." 58/ This most recent blossoming of nativist sentiment has given impetus to an insistence that English be declared the "official language" of the United States, including for purposes of elections.

Fueled by an unfounded fear that the cultural and linguistic differences of the new Hispanic and Asian immigrants create a "cultural separatism" threatening to the identity and

---

58/ L. Mealy, Note, English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII, 74 Minn L. Rev. 387, 389-90 (1989) (citations omitted). See also Califa, supra note 10, at 299-300; Lexicon, supra note 27, at 661; Arington, supra note 30, at 326-27. Again, it should be noted that such a reaction to the arrival of immigrants is nothing new:

> The Irish were the first to endure the scorn and discrimination later to be inflicted, to some degree at least, on each successive wave of immigrants by already settled "Americans."

John F. Kennedy, A Nation of Immigrants 40 (1964).

unity of the United States. 59/ This "movement" claims that given the governmental provision of bilingual education, bilingual government services, and, most relevant here, *bilingual ballots*, Hispanics and Asians are failing to assimilate into American culture because they have no incentive to learn English. 60/ Consequently, proponents have mounted a nationwide campaign and have seen a measure of success in securing the enactment of "official English" and "English-only" legislation 61/ at the state and local levels. Legislation to

---

59/ *See id*. *See also* Note, "*Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345, 1347-49, 1362 (1987); A.M. Ugalde, Note, "*No Se Habla Espanol": English-Only Rules in the Workplace*, 44 U. Miami L. Rev. 1209, 1227-28 (1990); L. Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. Rev. 17, 18 (Winter 1990).

60/ Note, however, that this narrow view of "American culture" excludes not only recent immigrants, but also (1) native-born Hispanic citizens in the Southwest whose roots there sometimes long predate the region's acquisition by the United States and the first arrival of Anglo immigrants; (2) Puerto Ricans in New York, New Jersey, Massachusetts, and elsewhere, who are native-born American citizens whose native tongue also is Spanish; and (3) Native Americans -- our nation's first residents -- as to whom "it is the declared policy of the United States government, as enacted by Congress, to encourage the use and preservation of Native American languages." Dunne Statement, *supra* note 19, at 11-12.

61/ *See* Cordero, *supra* note 59, at 18. Most "official English" laws simply declare English the "official language" of the state or political subdivision in question; "English-Only" laws generally also expressly restrict the use of languages

[Footnote continued]

similarly amend the U.S. Constitution has been repeatedly introduced, but never yet enacted.

Declaring English the "official" local, state, or national language is not a benign proposition. It is instead a "veiled expression of racism and xenophobia," and the adoption of English-only laws pose a significant threat to the exercise of the right to vote and the enjoyment of other rights by language minorities. 62/

Of special significance is the fact that English-only laws, as they exist today in some states and localities, would (or could) expressly prohibit bilingual voting materials, and would curtail as well, if not abolish, bilingual education programs. 63/ There is no question that state and local English-only laws which declare English the "language of the

---

61/ [Footnote continued]

other than English. *See also* Current Status of Voting Rights Act Language Assistance Coverage in Jurisdictions with English-only or Official English Laws, chart attached as Appendix B hereto, at pp. 5-7. While there thus is a significant difference in the two forms of legislation, for purposes of simplicity this Memorandum will generally refer to such enactments collectively as "English-only."

62/ *See* Cordero, *supra* note 59, at 18; *see also* K. Zoglin, *Recognizing a Human Right to Language in the United States*, B.C. Third World L.J. 15, 17 (1989).

63/ *See infra* Section III(c)(1); *see also* Appendix B at pp. 5-7.

ballot," are facially inconsistent with section 203's language minority provisions and are only overridden -- in jurisdictions covered by section 203, at least until August 8, 1992 -- by virtue of the Supremacy Clause (article VI) of the United States Constitution. 64/ Such English-only laws, while thus rendered currently unenforceable by the existence of the federal language assistance provisions in covered states and localities, would be given new life in the absence of the governing federal law. 65/

Lapse of section 203's language assistance provisions would not merely leave a void, but would in numerous states and subdivisions give the first real effect ever to local English-only laws. Thus, if the Act's language assistance provisions are not reauthorized, the potential effect of English-only legislation is significant: Language minorities in jurisdictions throughout the country would experience immediate and significant new impediments to voting, and, ultimately, to education, employment, and other rights and privileges of citizenship, in jurisdictions that have enacted English-only laws.

64/ See U.S. Const. art. VI, cl. 2; see also 28 C.F.R. § 55.2(h).

65/ See Tau v. Carriere, 117 U.S. 201, 209-10 (1885).

This issue was not a particularly salient matter seventeen years ago and thus was not directly analyzed in the 1975 MALDEF Impediments Analysis. It is most critical today, however, and calls for a detailed analysis. Accordingly, discussed below is an overview of the English-only movement; a survey and summary of the existing "English-only" and "official English" laws nationwide and an analysis of the potential impediments to voting posed by such laws.

1. The English-only movement

As noted above, the English-only movement is not wholly new to the United States: Anti-foreigner sentiment and unease over the influx of immigrants (culturally and ethnically different from the ruling majority) has in the past "been translated into hostility toward the use of any language other than English." 66/

66/ Arington, supra note 30, at 330. The roots of today's English-only legislation has been described thusly:

> At the end of the nineteenth century, sentiment towards non-English speakers began to take on a strikingly nativist color. The new wave of immigrants who entered this country after 1880 came predominantly from Southern and Eastern Europe and were religiously and ethnically different from earlier immigrants, most of whom had come from Northern and Western European countries. Religious and economic fears, as

[Footnote continued]

Currently, two organizations spearhead the movement to establish English as the official language of the United States: U.S. English, founded in 1982, 67/ and English First,

---

66/ [Footnote continued]

> well as a 'newly defined ethnocentricity,' engendered an Americanization movement, the goal of which was to transform foreigners into Americans as quickly as possible. Then, as now, anti-foreigner sentiment often translated into hostility toward the use of any language other than English.

Id. at 330-31 (emphasis added).

67/ The late Senator S.I. Hayakawa co-founded U.S. English with James Tanton in 1982. U.S. English is "committed to promoting the use of English in the political, economic, and intellectual life of the nation." U.S. English, In Defense of Our Common Language 134, 137 (1984). The organization's guiding principal is to "maintain the blessings of a common language -- English -- for the people of the United States." Id. It seeks to "reverse the spread of foreign language usage" by calling for the:

- Adoption of a Constitutional Amendment to establish English as the official language of the United States.
- Repeal of laws mandating multilingual ballots and voting materials.
- Restriction of government funding for bilingual education to short-term transitional programs only.
- Universal enforcement of the English language and civics requirements for naturalization.

Id. at 139 (emphasis added).

founded four years later. 68/ Proponents of state and local English-only legislation and an English Language Amendment ("ELA") to the federal Constitution assert a belief that a "common language can unify; separate languages can fracture and fragment society." 69/ An amendment to the U.S. Constitution

---

68/ English First was founded in 1986 as a project of the Committee to Protect the Family, a national pro-family lobbying organization. English First is linked to Gun Owners of America and U.S. Border Control. *See* L. Cordero, supra, note 59, at 24. A 1987 fundraising letter by English First suggests that an official English law is necessary because "'many immigrants these days *refuse* to learn English! They never become productive members of American society. They remain stuck in a linguistic and economic ghetto, many living off welfare and costing working Americans millions of tax dollars every year.'" *See* S. Armsby, People for the American Way, *Krasniy, Blanc and Azul: The English Plus American*, at 6 (April 13, 1991) (paper presented at Michigan State University, Conference on Language Pluralism in the U.S.: Linguistic Minorities and "English Only") (quoting 1987 English First fundraising letter). English-only supporters point to the provision of services in languages other than English, such as emergency 911 services, school notices to parents, radio broadcasts, and bilingual advertising as disincentives to the learning of English by language minorities. *See* W. Trombley, *English-Only Proposition Kindles Minorities' Fears*, L.A. Times, October 12, 1986, at 1. U.S. English organized a letter writing campaign in 1985 to Pacific Bell, stating its objection to the publication of Spanish-language Yellow Pages. *Id*. at 30. U.S. English reportedly also petitioned the Federal Communications Commission to limit Spanish-language radio stations in South Texas, apparently later explaining that their real grievance was that there were "too few" *English*-language stations along the Texas/Mexico border. *Id*. *See also* Califa, *supra* note 10, at 319 n. 179.

69/ 127 Cong. Rec. 7400, 7444 (April 27, 1981) (statement of the late Senator S.I. Hayakawa, chief proponent of the ELA and co-founder of U.S. English).

declaring English the official language of the United States is said to be "needed to clarify the confusing signals we have given in recent years to immigrant groups." 70/ Bilingual education programs and bilingual elections have been specifically targeted for abolition, in order to remedy the "cultural separatism" that proponents believe exists as a result of such programs. The English language is said to be "under attack" and so-called affirmative steps necessary to "guarantee that it continues to be our common heritage." 71/

70/ *Id*. ("[T]hough you must be a citizen to vote, some recent legislation has required bilingual ballots in some areas. This amendment would end that contradictory, logically conflicting, situation.") *Id*.

71/ U.S. English, *In Defense of Our Common Language* at 135; "Failure to do so may well lead to institutionalized language segregation and a gradual loss of national unity." *Id*. According to U.S. English the "erosion of English" is attributable to "several causes:

- Some spokesmen for ethnic groups reject the "melting pot" ideal; they label assimilation a betrayal of their native cultures and demand government funding to maintain separate ethnic institutions.
- Well-intentioned but unproven theories have led to extensive government-funded bilingual education programs, ranging from pre-school through college.
- *New civil rights assertions have yielded bilingual and multilingual*

[Footnote continued]

These arguments, however, miss the point. The ends, in this country at least, do not justify the means. The abolition of English-only elections and bilingual education is not necessary to create "incentives" for language minorities to learn English, 72/ and in any event the inevitable detraction from language minority citizens' ability to vote that results from English-only elections is unacceptable. At the present time, the Voting Rights Act's language assistance provisions thus constitute vital safeguards against the effort to erect significant new barriers through the enactment of English-only laws to access to the ballot.

71/ [Footnote continued]

> ballots, voting instructions, election-site counselors, and government-funded voter registration campaigns aimed solely at speakers of foreign languages.
>
> - Record immigration, concentrated in fewer language groups, is reinforcing language segregation and retarding language assimilation.
> - The availability of foreign language electronic media, with a full range of news and entertainment, is a new disincentive to the learning of English.

Id. at 136 (emphasis added).

72/ See supra note 10.

2. The English Language Amendment

The ELA was first introduced in Congress in 1981 by the late Senator S.I. Hayakawa. 73/ Since 1981 other congressional sponsors have successively re-introduced versions of an ELA. 74/ A prototype bill, introduced by Representative Nelson Shumway in the 101st Congress, states, *inter alia*:

> Section 1. The English language shall be the official language of the United States.

73/ S.J. Res. 72, 97th Cong., 1st Sess., 127 Cong. Rec. 7400 (1981). In the words of Senator Hayakawa, the ELA would:

- "[E]stablish English as the official language of State, Federal, and local government business;"
- "*[A]bolish requirements for bilingual election materials*;"
- "[A]llow transitional instruction in English for non-English-speaking students, but do away with requirements for foreign-language instruction in other academic subjects;"
- "[E]nd the false promise being made to new immigrants that English is unnecessary for them."

127 Cong. Rec. at 7444 (emphasis added).

74/ H.R.J. Res. 96, 99th Cong., 1st Sess., 131 Cong. Rec. 902 (1985); S.J. Res. 20, 99th Cong., 1st Sess., 131 Cong. Rec. 737 (1985); S.J. Res. 167, 98th Cong., 1st Sess., 129 Cong. Rec. 25049 (1983); H.R.J. Res. 169, 98th Cong., 1st Sess., 129 Cong. Rec. 3618 (1983); H.R.J. Res. 656, 100th Cong., 2d Sess. (Sept. 15, 1988), reintroduced as H.R.J. Res. 81, 101st Cong., 1st Sess. (Jan. 19, 1989), H.J. Res. 81, 102nd Cong., 1st Sess. (Jan. 18, 1991).

> Section 2. Neither the United States nor any State shall require, by law, ordinance, regulation, order, decree, program, or policy, the use in the United States of any language other than English. . . . 75/

The sweeping prohibition in section 2 of the Shumway Bill and similar provisions in local English-only laws is irretrievably inconsistent with the language assistance provisions of the Voting Rights Act. In introducing House Resolution 81, Representative Shumway stated:

> "Government-sponsored policies that recognize other languages . . . actually discourage proficiency in our common tongue. * * * The joint resolution that we are introducing establishes English as the official language of the United States, *prohibits the use of the bilingual ballot*. . . . and ends the use of foreign languages in subject-matter instruction." 76/

75/ H.J. Res. 81, 1st Sess., 101st Cong., 1st Sess. (Jan. 19, 1989) (the "Shumway Bill").

76/ *See* 131 Cong. Rec. 1101-1102 (Jan. 24, 1985) (emphasis added). This view was also expressed by Senator S. Symms (R-Idaho) in a statement introducing ELA legislation in 1985. *See* 131 Cong. Rec. 786 (Jan. 22, 1985) ("Many Americans now feel like strangers in their own neighborhoods, aliens in their own country. The American people resent the failure of Congress to correct laws that are clearly dysfunctional . . . . [The Governor of California has called] upon Congress and the President for an end to bilingual ballots. * * * Ten percent of the States have now declared English their official language, and several more State legislatures are going to do the same in the next two years.") *See also* 129 Cong. Rec. 25049-50 (Sept. 21, 1983); 129 Cong. Rec. 3730-31 (March 2, 1983).

Opponents of the ELA and English-only legislation -- MALDEF among them -- believe that the effect, if not the intent, of the adoption of the ELA would be to discriminate against and effective disenfranchise language minorities. 77/ According to the Journal of Hispanic Policy, "measures that [were] alleged to promote the English language [in the past] have in fact turned out to be vehicles for national origin discrimination." 78/ Thus, the "essential lesson" gleaned from the struggle of language minorities for equality is that

> historically [minorities] have been discriminated against on the basis of their language. The passage of English literacy requirements against the Chinese in the Philippines, against the foreign-born language-speaking European in California or New York had at its roots an attempt to curtail the civil rights of these national origin groups. The history of the Mexican American in the Southwest discloses the intentional segregation of their children on the basis of their Spanish language. Such segregation was alleged to be for remedial purposes, when in fact courts found it to be because of the race and national origin of the Mexican American child. 79/

77/ *See supra* note 59 (citing law review articles).

78/ M. del Valle, *Developing A Language-Based National Origin Discrimination Modality*, 4 J. Hispanic Policy 53, 69 (1989-1990) (published by the Hispanic Student Caucus at the John F. Kennedy School of Government, Harvard University).

79/ *Id*.

LULAC's Arnoldo S. Torres testified in 1984 before the Subcommittee on the Constitution that the movement to enact the ELA "is really a backhanded attempt to further ostracize Hispanics and other language minorities from fully participating in society in the same way that Jim Crow laws ostracized blacks." 80/ People for the American Way has likewise observed that the English-only movement threatens the civil and constitutional rights of non-English speaking citizens by seeking

---

80/ Testimony of Arnoldo S. Torres, *supra* note 7, at 156. This view was echoed by Elaine Ruiz-Rodriquez, the founder of El Comite En Defense Del Idioma, in a paper presented at the Sixth National Puerto Rican Convention:

> The goals of U.S. English [and proponents of the ELA] are the elimination of federal funding for bilingual education programs and gaining the legal and legislative ammunition to challenge the Voting Rights Act of 1965 that provides non-English speaking residents with the right to bilingual ballots. They intend to do this through lobbying support for Federal Legislation that calls for a 27th Amendment to the U.S. Constitution. If U.S. English is successful, it will be the first time in the history of the U.S. that the Constitution will be used to be exclusive rather than inclusive, violating the moral and historical premise upon which the Constitution of the United States was written.

E. Ruiz-Rodriquez, *The "English-Only" Movement and the Language Rights of Puerto Ricans* (paper presented at the Sixth National Puerto Rican Convention on the English-Only Movement (1990).

to repeal federal bilingual ballot assistance and bilingual educational programs:

> Although English-only advocates claim that requiring the use of English will promote national unity and encourage all immigrants to learn the common language, their efforts actually threaten the civil and constitutional rights of non-English speaking citizens and undermine our heritage of welcoming new citizens and respecting their contributions to the American culture. English-only is an attempt to disenfranchise or withhold political, educational and economic opportunities from those who have not become sufficiently "Americanized." Those not yet proficient in English are conveniently blamed for causing a lack of unity in this huge and naturally diverse country. [81]

3. State and local English-only laws

To date, eighteen states have enacted legislation [82] to declare English their official language: Alabama, Arizona, [83] Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and

---

[81] Armsby, *supra* note 68, at 1.

[82] *See* Appendix B at pp. 5-7.

[83] Article XXVIII of the Arizona Constitution was declared unconstitutional as violative of the First Amendment by the United States District Court for the District of Arizona in *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz.), pending appeal, *amendment denied by*, *Yniguez v. Mofford*, 130 F.R.D. 410 (D. Ariz. 1990), *aff'd in part*, *denied in part*, *Yniguez v. State of Arizona*, 939 F.2d 727 (9th Cir. 1991).

Virginia. *84*/ Prior to the revitalization over the last two decades of a significant (albeit still minority) nativist English-only movement, only four states (Hawaii, Illinois, Nebraska, and Virginia) had theretofore declared English their official language. *85*/ Since the early 1980s, however, the English-only movement has gathered increasing momentum at the state level. Since 1984, fourteen states, three municipalities (including the cities of Fillmore and Los Altos, California, and Lowell, Massachusetts), and Dade County, Florida, have enacted English-only legislation. *86*/

84/ The states of Arizona, California, Colorado, Florida, Hawaii and Nebraska declared English the official language of the state through constitutional amendments, the state of Georgia by resolution, and the remaining states by statutory enactments. *See* Appendix B at pp. 5-7.

85/ *See* Haw. Const. art. XV, § 4 (1978); Ill. Ann. Stat. ch. I., para. 3005 (1969); Neb. Const. art I, § 27 (1920); Va. Code Ann. § 22-1-212-1 (1981); *see also* English Plus Information Clearinghouse ("EPIC"), *State Update and Strategy Options* 1 (April 3, 1989).

86/ EPIC, *State Update and Strategy Option*, at 4 (April 3, 1989); *see also* Arington, *supra* note 30, at 326, n.9. The movement is far from satiated. In 1987, voter-initiated referenda to declare English the states' official language were proposed and considered in 33 states. During the 1988 presidential election, English-only legislation was proposed in 22 states. *See* S. Dharmadhikari, *The Official English Movement in New York and The Nation*, at 1 (Office of Immigrant Affairs, Department of City Planning, City of New York, June 27, 1989). In 1989, state legislators introduced English-only legislation in Connecticut, Iowa, Kansas, Maryland, Massachusetts,

[Footnote continued]

The existing state English-only laws fall into three general categories. Seven states (Georgia, Illinois, Indiana, Kentucky, Mississippi, North Carolina, and North Dakota) have enacted "official English" laws which simply declare English to be their official language. 87/ Four states (Alabama, California, Colorado and Florida) have enacted statutes or amended their state constitutions to declare English their official language; to empower the state legislature to act to preserve English as the common language of the State and (in Alabama and California only) to expressly allow a private right of action against the state government to ensure the enforcement of this legislation. 88/ Six states (Arizona, Arkansas, Nebraska, South Carolina, Tennessee, and Virginia) have enacted legislation or amended their state constitutions

---

86/ [Footnote continued]

Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, Utah, West Virginia and Wisconsin. See Mealy, supra note __, at 391, n.19. See also EPIC, supra, at 1 (listing the state of Alabama which would make the total 19).

87/ See, e.g., Appendix B at pp. 5-7, see also Ga. Comp. R. & Regs. res. 70 (1986) ("English is the official language of the State Georgia"); Ind. Code § 1-2-10 (1984) ("English is the official language of the State of Indiana"); Miss. Code Ann. § 3-3-31 (1972)("English language is the official language of the State of Mississippi").

88/ See Appendix B at pp. 5-7.

to expressly declare English the language of the ballot and/or impose restrictions on the use of languages other than English in the exercise of official governmental functions, in employment, and in the instruction of bilingual education. 89/

Broad, prohibitive and far-reaching English-only legislation, such as the laws which declare English the "language of the ballot," pose a very real and immediate threat to bilingual programs and to the meaningful exercise of the right to vote by citizens who are language minorities. Laws which "only" declare English the official language of the state, in contrast, are considered "merely as symbolic." 90/ The threat of the "symbolic" form of law, while more subtle, is equally clear.

The most restrictive English-only law enacted to date 91/ is Article XXVIII of the Arizona Constitution, which

---

89/ See Appendix B at pp. 5-7. Of the two remaining states, the Arkansas statute declares English the official language of the state expressly carving out an exception to the law's application: "This section shall not prohibit the public school from performing their duty to provide equal educational opportunities to all children." Id. The State of Hawaii declares both English and Hawaiian the official language of the state and requires the use of the Hawaiian language for public acts and transactions only as provided by law. Id.

90/ See Arington, supra note 30, at 339. Nevertheless, this symbolism is, among other things, of intolerance.

91/ Id. at 326 n. 8.

was placed on the ballot by initiative and approved by Arizona voters in the general election on November 8, 1988. The text of the article declares that "[t]he English language is the official language of the State of Arizona. As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions." 92/ Article XXVIII applies to:

> (i) the legislative, executive and judicial branches of government
>
> (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,
>
> (iii) all statutes, ordinances, rules, orders, programs and policies.
>
> (iv) all government officials and employees during the performance of government business. 93/

Two days after the enactment of Article XXVIII, on November 10, 1988, Maria-Kelley Yniguez filed suit in the United

---

92/ Ariz. Const., art. XXVIII, § 1(2) (1988) (emphasis added).

93/ *Id.* at § 1(3)(a). The phrase "[t]his State and all political subdivisions of this State" includes "every entity, person, action or item described in this Section, as appropriate to the circumstances." *Id.* at § 1(3)(b).

States District Court for the District of Arizona. 94/ Ms. Yniguez successfully challenged the validity of Article XXVIII as violative of the First Amendment because of its "blanket prohibition on the use of any language other than English in the state workplace . . . ." 95/

94/ *See* *Yniguez v. Mofford*, 730 F. Supp. at 310. Ms. Yniguez, a bilingual state employee of Hispanic descent was employed as an insurance claims manager by the Risk Management Division of the Arizona Department of Administration at the time that she filed this suit. *Id*. Prior to the enactment of Article XXVIII, Ms. Yniguez often spoke Spanish to Spanish-speaking persons who asserted medical malpractice claims against the state. *Id*.

95/ *Id*. at 314. Following the District Court's ruling, the State of Arizona filed an appeal with the Ninth Circuit. *See* *Yniguez v. State of Arizona*, 939 F.2d 727 (9th Cir. 1991). If the District Court's opinion is not affirmed, Arizona's explicit prohibition on the use of bilingual ballots will be ineffective only as long as the language assistance provisions of the Voting Rights Act remain in effect.

The District Court decision in *Yniguez* did not rule on plaintiff's Title VII claims. It is Title VII, along with the First Amendment, the Voting Rights Act language assistance provisions, and federal statutes dealing with bilingual education, *see* *infra* at pp. 73-79, that provides one of the clearest potential federal checks on state and local English-only laws that otherwise might be applied discriminatorily against members of language minority groups. The EEOC has generally held that an employer who prohibits employees from conversing in their native language unlawfully discriminates on the basis of national origin. Specifically, the EEOC Title VII Guidelines on National Origin Discrimination state:

> The primary language of an individual is often an essential national origin

[Footnote continued]

The State of Tennessee also has expressly declared English to be the language of the ballot. Section 4-1-404 of the Tennessee Code enacted in 1985 states that:

> English is hereby established as the official and legal language of the State of

---

95/ [Footnote continued]

> characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment . . . .

29 C.F.R. § 1606.7 (1987). The Guidelines further emphasize the requirement that any such policies be job-related; that is, if an employer wishes to prohibit conversation in foreign languages, he or she must demonstrate that such a regulation is necessary for safe and efficient job performance. Ugalde, *supra* note 59, at 1221 (citing 29 C.F.R. § 1606.7 (1988).

The leading Title VII cases on the legality of English-only rules are *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) and *Gutierrez v. Municipal Court*, 838 F.2d 1031, *vacated as moot*, 109 S. Ct. 1736 (1989). In *Garcia v. Gloor*, the Fifth Circuit held that an employer's rule requiring bilingual employees who worked in sales to speak only English on the job except during breaks or when they were speaking with Spanish-speaking customers, did not violate Title VII. 618 F.2d at 270. The court noted that, even if the rule did have a disparate impact on Latinos, valid business reasons including customer and supervisor preference and improving the employees' English fluency could still justify the rule. A number of post-*Garcia* decisions have similarly upheld limited English-only rules in the workplace either by finding that no disparate impact resulted because the employee could have easily complied, or by determining that business necessity justified the imposition of the rule. *See* Mealy, *supra* note 58, at 410 (and cases cited therein).

[Footnote continued]

> Tennessee. All communications and publications, including ballots, produced by governmental entities in Tennessee shall be in English, and instruction in the public schools and colleges of Tennessee shall be conducted in English unless the nature of the course would require otherwise. 96/

Unlike the State of Arizona, the State of Tennessee is not required under the Voting Rights Act to provide any bilingual voting or registration materials to language minorities. 97/ Any voluntary language assistance which the state legislature or the local government otherwise might be inclined to provide to language minorities residing in Tennessee is ostensibly

---

95/ [Footnote continued]

In 1988, the Ninth Circuit confronted a similar English-only rule and rejected the Fifth Circuit's Garcia analysis in Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988). The court ruled that the English-only policy at issue therein had a disparate impact on a national origin group and constituted a discriminatory condition of employment. Id., 838 F.2d at 1044. The court further held that the justifications put forth by the employer for the policy did not satisfy the "rigorous business necessity standard." Id. Obviously, Garcia and Gutierrez represent a serious divergence of opinion within the federal circuit courts as to whether an English-only rule constitutes national origin discrimination under Title VII.

96/ Tenn. Code Ann. § 4-1-404 (1985) (emphasis added).

97/ See Bureau of the Census, Voting Rights Act Amendments of 1982, Determinations Under Title III, 49 Fed. Reg. 25887, 25888 (June 25, 1984).

prohibited by the express language of the Tennessee English-only law. As a consequence, a significant number of the 75,000 Native Americans, Asians, and Hispanics in Tennessee may be denied, at any time, the effective exercise of their right to vote. 98/

Widely accepted "as the prototype of 'official English' legislation," 99/ the official-English amendment to the constitution of the State of California, commonly known as proposition 63, states in pertinent part:

> The Legislature and officials of the State of California shall take all steps necessary to insure that the role of the English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California. 100/

98/ According to data from the 1990 Census, 10,000 American Indians, Eskimos or Aleuts, 32,000 Asian or Pacific Islanders and 33,000 persons or Hispanic reside in the State of Tennessee. *See* 1990 Census Profile at 4-5. The Census Bureau has not released data on the number of language minorities in this jurisdiction based on 1990 Census Information.

99/ Ugalde, *supra* note 59, at 1230.

100/ Cal. Const. art. III, § 6(c) (1986). The California law grants a private right of action to citizens to ensure the

[Footnote continued]

Given the broad language used in the California provision, as well as similar provisions enacted by Colorada, 101/ Florida, 102/ other state legislatures, such laws may well be interpreted in the future to prohibit the state from providing voting materials in any language other than English. 103/ Thus, notwithstanding the potential willingness and good faith efforts of local and state officials to provide multilingual ballots, language minorities living with English-only laws in states or subdivisions not covered by the Act's language assistance provisions are vulnerable to effective

---

100/ [Footnote continued]

implementation of the law. *Id*. *See also* 1989 Ala. Acts 89-461; Appendix B at pp. 5-7. The English-only statutory provisions of the States of Colorado and Florida are self-executing, yet also empower the legislature to enact laws to ensure that English remains the official state language. *See* Appendix B at pp. 5-7.

101/ Article III, Section 30a of the Colorado Constitution states that "[t]he English language is the official language of the state of Colorado . This section is self-executing; however, the General Assembly is empowered to enact laws to implement this Section." *See* Appendix B at pp. 5-7.

102/ Article 2, Section 9 of the State Constitution for the State of Florida declares that "English is the Official Language of Florida. The Legislature shall have the power to enforce this section by appropriate legislation." Fl. Const. art.2, § 9 (1988); *see* Appendix B, at pp. 5-7.

103/ *See infra* note 107.

disenfranchisement -- as many more jurisdictions will be if section 203(c) is not reauthorized.

For example, only nine counties in the State of California are subject to the requirements of either section 4(f)(4) or section 203(c). 104/ Of these, three counties (Kings, Merced, and Yuba) are subject to the requirements of section 4(f)(4), and six counties (Fresno, Imperial, Kern, Madera, San Benito, and Tulare) are covered only under section 203(c). 105/ Notably, neither Los Angeles County nor San Francisco County are required under either provision to provide language assistance in voting and registration.

Nonetheless, San Francisco voluntarily mails trilingual ballots in English, Spanish, and Chinese to all registered voters; Los Angeles provides bilingual ballots in Spanish upon request. 106/ However, since the passage of California's official-English amendment, proponents of

---

104/ *See* 49 Fed. Reg. at 25888; *see also* Appendix B at pp. 1-4.

105/ *Id*. Kings County, covered under section 203(c), is also covered under section 4(f)(4).

106/ *See* MALDEF, *Local Bilingual Election Laws in Counties with 25,000+ Hispanics Not Now Covered By Section 203(c) or 4(f)(4)* at 6, 9 (August 22, 1991).

English-only have realistically "threatened to mount a legal campaign against bilingual programs." 107/

Denver and El Paso counties in Colorado also are not covered under either section 203(c) or 4(f)(4) of the Voting Rights Act. Nonetheless, in Denver all voting instructions, sample ballots, and ballots provided in the voting booth still are printed in Spanish. 108/ In El Paso County, bilingual sample ballots are provided at the polls and upon request. 109/ In addition, El Paso County "provides bilingual election judges for precincts where 5% or more of the voting age population is Hispanic." 110/ According to a legislative

---

107/ "Stanley Diamond, head of the California chapter of U.S. English, said his organization is preparing lawsuits against Los Angeles, San Francisco, Alameda County and two other municipalities [because of] the continued use of multilingual ballots." L. Cordero, *supra* note 59, at 51. *See also* Statement of Hon. Gloria Molina, Member of the Los Angeles County Board of Supervisors, before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Hearing on Voting Rights Act Language Assistance Amendments of 1992 (February 26, 1992) ("Molina Statement"), at 4. ("Although Los Angeles County provides facsimile ballots in Spanish upon request, English-only proponents have been threatening to take legal action to prohibit local bilingual assistance . . . .").

108/ MALDEF, *supra* note 106, at 13.

109/ *Id*.

110/ *Id*. Although no longer covered by the Act's language assistance provisions following the enactment of the Nickles Amendment, MALDEF researchers were assured that "El Paso County

[Footnote continued]

council analysis of Colorado's English-only law, however, "proponents argue that the provision of the proposal [which declares the law self-executing] could be a legal basis to support challenges in the courts to any government programs in the State which circumvent its intent and meaning, or to invalidate any attempts by government to mandate the use of non-English [sic], except where health, safety and justice or Federal laws require the use of non-English languages." 111/

While these English-only laws thus currently have no effect on elections in jurisdictions covered by the Act, their ultimate effect in jurisdictions not covered under either

---

110/ [Footnote continued]

will continue [to] provid[e] the above[-described] bilingual assistance at least as long as current Supervisor of Elections Ardis Schmidt is in office." Id.

111/ Colorado Advisory Committee to the United States Commission on Civil Rights, Nativism Rekindled: A Report On The Effort To Make English Colorado's Official Language 6-7 (Summary Report September 1989) (quoting Letter and Ballot Analysis on Amendment Number 1 from Charles S. Brown, Staff Director, Legislative Council, Colorado General Assembly to Thomas V. Pilla, Civil Rights Analyst, Western Regional Division, U.S. Commission on Civil Rights at 1 (September 8, 1988)) (emphasis added). Effectively countermanding the enactment of English-only constitutional amendment at least for the present, Colorado's Governor Roy Romer has "ordered that interpreters . . . [are] still to be made available to people filling out State forms such as driver's license applications," see S. Dharmadhikari, supra note 86, at 6; in Denver County, "Mayor Pena [has] issued an executive order telling City workers to take no action to enforce the new law." See id.

sections 4(f)(4) and 203(c) may be to limit the ameliorative discretion that local and state officials have exercised heretofore in providing more than the minimum requirements of federal law. In covered jurisdictions with English-only laws, the result of a lapse in coverage is clear. The States of Alabama, New England, South Carolina, Tennessee, and Virginia are not covered by either sections 203(c) or 4(f)(4) and in four other states (Arizona, California, Colorado, and Florida) the number of counties covered by sections 203(c) and/or 4(f)(4) varies. Twenty-three of the counties in the latter four covered states are now protected by the federal requirements of section 203(c), but are not also covered by section 4(f)(4). If 203(c) is not reauthorized, the election officials in these jurisdictions may be immediately and affirmatively barred, by operation of existing local English-only laws, from offering any form of language assistance.

4. Discrimination in the wake of English-only.

At the February 26, 1992 Senate subcommittee hearing on reauthorization of section 203, a representative of English First claimed that bilingual ballots and other forms of language assistance in voting were somehow "dangerously divisive." 112/ To the contrary, there is substantial evidence that it is the enactment of English-only legislation that has encouraged discrimination and hostility and an increased intolerance toward language minority citizens. While this is not directly a concern of Congress as it reconsiders language assistance, it must at least indirectly become a concern, as the lapse of the existing provisions may fuel additional acts of discrimination:

> The apparent innocuousness of [some English-only measures does] not begin to reflect the hostility, resentment, and divisiveness they engender. So vague as to be virtually limitless, private individuals, and businesses have taken it upon themselves to implement and enforce these English-only laws. For example:
>
> - Shortly after the passage of the official English law in Arizona, Hispanic inmates were denied parole board hearings. Since these hearings were required to be conducted in English-only, and the state refused to provide interpreters, Hispanic inmates were denied fundamental due process rights.
>
> - The passage of the English-only law in Florida generated a flood of complaints of discriminatory activity directed at the language minority population by private businesses and individuals. For example, a cashier at a Publix supermarket was suspended for asking a fellow employee a question in Spanish. This resulted in protests and a boycott

---

112/ See supra note 29.

of the store. Also, customers who had previously been allowed to place catalog orders in Spanish in the past were now being refused; and even telephone collect calls were not being connected if the receiving party did not speak English.

- Apart from the actual discriminatory activity generated by English-only legislation, such legislation begets more restrictive measures. Indeed, the English-only bill introduced in the Suffolk County legislature this year would have prohibited the use of county funds for purposes of investigating complaints or practices of language discrimination resulting from [enactment of the bill]. 113/

113/ See An Open Letter to the Committee on Energy and Natural Resources, from Martha Jimenez, Esq., Policy Analyst, Mexican American Legal Defense and Educational Fund 1-2 (July 14, 1989) (citations omitted). Moreover, "in Monterey Park, a Los Angeles suburb with a large Chinese population, residents campaigned against advertising signs in Chinese characters. Similar protests were made in Linda Vista, a San Diego suburb with a sizable Southeast Asian community. English-only advocates have also organized protests against such corporations as Philip Morris, Pacific Bell, and McDonald's for providing foreign language directories, billboards, and menus." Cordero, supra note 59, at 51 (citations omitted). Similarly, in Florida the U.S. English has lobbied against: "bilingual McDonald's menus, Spanish services provided by public hospitals, including instructions for patients recovering from pre- and post-natal care, use of the United States mail for Spanish language advertisements from Florida shopkeepers and even Spanish language materials in libraries. Florida English has also called for the elimination of 911 services for non-English-speakers noting that '[e]verybody calling the emergency line should have to learn enough English so they can say 'fire' or 'emergency' and give the address.'" Id.

In jurisdictions not covered by the language assistance provision of the Act, thousands of U.S. citizens already are disenfranchised because they cannot understand the ballot. If the existing language minority provisions are not reauthorized, the impediments already posed by English-only elections will only be exacerbated.

C. Continuing Inequities in the Provision to Members of Language Minority Groups of Educational and Employment Opportunities, Health Care, and Housing Establish Substantial Barriers in Their Own Right to the Effective Exercise of the Franchise.

Two centuries ago Thomas Paine observed, "[t]he right of voting . . . is the primary right by which other rights are protected." 114/ Paine was right, insofar as his understanding extended, but he failed to predict the reciprocity that has

---

114/ Thomas Paine, "Dissertation on First Principles of Government," 3 The Writings of Thomas Paine 267 (M. Conway, ed., 1895). Echoing this view, the Hastings Constitutional Law Quarterly has noted:

> Voting is the primary means by which Americans protect a host of interests germane to the quality of their lives. It is the means by which they elect those who will best represent their interests in government. The voting franchise also preserves other civil and political rights. It preserves the procedural due process right of persons to participate in the application and creation of laws that are

[Footnote continued]

come to exist between the "primary right" of voting and the "other rights" of American citizenship. Thus, it is surely true that citizens who are effectively disenfranchised are less able to ensure that government adequately protects their rights in the areas of, for example, education, employment, and housing. It is equally true, however, that persons who suffer from relative deficits in education or employment are consequently less able to effectively exercise their right to vote -- whether it is because they do not have an adequate comprehension of English, or because they do not have the means to get to the polls on election day. Thus, the relationship between barriers to voting and the degradation of other rights can become a form of mutually reinforcing repression -- an ever deteriorating orbit from which it is exceedingly difficult to break free. And as with the various direct barriers to voting that have been discussed above, members of language minority groups also continue to suffer from the effects of discrimination in other areas of their lives, thus serving to compound their difficulties in wielding an effective vote.

114/ [Footnote continued]

> relevant to their individual situations. Voting also preserves the first amendment right to freedom of political expression.

V. Lexicon, *supra* note 27, at 668 (citations omitted).

1. Education

In 1975, MALDEF noted that "grossly deficient" public educational opportunities afforded to many language minorities -- resulting both from state and local school funding disparities and *de facto* segregation -- was a significant part of the root cause of their present need for language assistance in voting:

> [A]lthough the English-only election may not have been specifically designed as a tool of discrimination, the inability of a Spanish-speaking voter to comprehend these elections is as much a consequence of state action as is the Southern black's inability to pass a literacy test. In great measure, the functional illiteracy prevalent among Mexican Americans in the Southwest is the result of a failure in the part of local governments to provide education which will equip these citizens to operate in the broader society and participate effectively in the electoral process. 115/

115/ 1975 MALDEF Impediments Analysis, *supra* note 6, at 776. Among the authorities documenting this conclusion were: *Graves v. Barnes*, 343 F. Supp. at 731 (the "lack of political participation by Texas Chicanos . . . has been fostered by a deficient educational system"); *United States v. Texas*, 342 F. Supp. 24, 24 (E.D. Tex. 1971) (Mexican American students in Texas "have been subjected, over the years, to unequal treatment with respect to the educational opportunities afforded them"); *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599, 617-20 (S.D. Tex. 1970), *modified*, 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973), *rehearing denied*, 414 U.S. 881 (1973) (finding inferior education for Hispanic students as a result of the operation of a dual school system). Also providing documentation for the deficiencies in educational opportunities afforded to Hispanic students was a sequence of reports entitled, *Mexican American Educational Series*, issued by the United States Commission on

[Footnote continued]

Regrettably, this portrait has not substantially improved since 1975. Hispanic adults are nearly eight times as likely as non-Hispanics to be illiterate, no doubt at least in part because of the legacy of discriminatory educational opportunities. 116/ As first Hispanic ever elected to the Los Angeles County Board of Supervisors recently observed:

> The conditions which prompted the Congress to adopt the bilingual education requirements of section 203 in 1975 -- low educational attainment levels, pervasive discrimination against language minorities, and English-only elections -- persist today.
>
> Educational attainment levels within the Latino community lag far behind the rest of the country, and the gap between Latinos and non-Latinos widens. . . . [O]nly [51.3%] of Latinos 25 years or older had completed four years or more of high school by 1991. Among Mexican-Americans, the figure dropped to [43.6%]. The completion rate for non-Latinos was [80.5%].

115/ [Footnote continued]

Civil Rights. See Report I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (1971); Report II: The Unfinished Education (1971); Report III: The Excluded Student (1972); Report IV: Mexican American Education in Texas -- A Function of Wealth (1972); Report V: Teachers and Students (1973); Report VI: Toward Quality Education for Mexican Americans (1974).

116/ Statement of Hon. Jose E. Serrano, Member of Congress, before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Hearing on Voting Rights Act Language Assistance Amendments of 1992 (February 26, 1992) ("Serrano Statement"), at 11 (citing statistics reported in National Council of La Raza, State of Hispanic America 1991: An Overview (1991)).

> The trends during the last two decades are even more disturbing. While high school completion rates improved twelve percentage points for African-American students and two percentage points for Anglo students, the completion rate dropped three percentage points for Hispanic students. These low educational attainment levels translate directly unto limited English proficiency among many Latino citizens. 117/

In many respects, these inequities are today only beginning to be addressed, where they are being addressed at all. 118/ Continuing disparities in public educational opportunities thus still handicap the efforts of language

---

117/ Molina Statement, supra note 107, at 1-2. (citing statistics reported in Bureau of the Census, The Hispanic Population in the United States: March 1991 (1991); National Education Goals Panel, The National Education Goals Report, 1991: Building a Nation of Learners (1991)). It is significant that Supervisor Molina's election in 1991 was only made possible by the successful conclusion of section 2 litigation against the county. See supra note 45 (citation to Garza v. County of Los Angeles).

118/ A substantial, if indeed not insurmountable, hurdle to addressing school finance disparities in the federal courts was created by the Supreme Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), in which the Court refused to recognize education as a "fundamental" right under the U.S. Constitution, and refused as well to recognize the disadvantaged plaintiff class of poor persons as a "suspect classification."

minority students to gain full access to the American culture and society. 119/

In recent years, state courts applying state constitutional standards have finally begun to acknowledge -- and begun the effort to reshape, in an increasing number of cases -- school finance systems that disadvantage the poor. 120/ While this development is heartening, it will take many years of concerted effort to bring even rough equity in resources, facilities, and teaching -- and many more years beyond that before all students, including language minority students, receive the full benefits of the effort. These benefits, of course, will be realized only in those relative handful of states that undertake (generally under compulsion by their courts) to make their school funding more equitable, thus still leaving throughout the country "[i]nequitable systems of

---

119/ See Dunne Statement, supra note 19, at 2 ("[T]he [1975] judgment of Congress that minority language individuals have not had the same educational opportunities as the majority of citizens has been confirmed by experience. The illiteracy rate of minority language individuals has almost always exceeded that of the rest of society.").

120/ See, e.g., Helena Elementary School District No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), modified, 236 Mont. 60, 784 P.2d 412 (1990); Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989); DuPree v. Alma School District No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Washakie County School District No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980).

school finance [that] inflict disproportionate harm on minority and economically disadvantaged students." *121*/

With the effort to redress school funding inequities only beginning at best, there is substantial evidence that the effort to desegregate our schools -- and thus eliminate the dual school systems that comprise one of the major barriers in the path of language minority students -- may actually be losing ground. After widespread progress in the 1970s to desegregate the nation's schools, the 1980s saw at least as many schools "resegregating" as desegregating. Thus today Hispanic students in the United States are even less likely than African American students to be educated in truly desegregated schools. *122*/

121/ William L. Taylor & Diane M. Piche, H. Comm. on Educ. and Labor, 102nd Cong., 1st Sess., *A Report on Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk* xi, (Comm. Print 1991).

122/ *See e.g.*, Gary Orfield & Franklin Monfort, *Status of School Desegregation: The Next Generatio.* (Pre-Publication Draft Report, January 8, 1992): "Segregation for Hispanics has increased dramatically during a period when the nation's Hispanic enrollment has soared and Hispanics have increased from less than a twentieth to more than a tenth of American students." *Id*. at 1. This increasing segregation of Hispanic students is reflected not only *between* schools, but *within* schools as well. *See* Molina Statement, *supra* note 107, at 3 (citing General Accounting Office, *Within-School Discrimination: Inadequate Title VI Enforcement by the Office of Civil Rights* (1991)).

Compounding these continuing inequities in the provision of resources and equal educational opportunities to language minority students are the uneven approaches prevalent throughout the country to the education of language minority students in the English language -- and the present threat to even those efforts posed by the English-only movement. In the 1960s and 1970s, educators began to press for alternatives to English-only classrooms for students who were not proficient in English, warning that such an environment threatens the self-esteem and academic performance of some students. 123/ Recommended alternatives varied from immersion in a mainstream, English-speaking class (with occasional breaks for "English as a Second Language" ("ESL") instruction), to a complete bilingual/bicultural classroom environment.

In 1967, Congress passed the Bilingual Education Act 124/ to address the special educational needs of language-minority children by allocating funds for bilingual education programs that were directed at low-income children

---

123/ Note, *supra* note 59, at 1351 (citing S. Rep. No. 726, 90th Cong., 1st Sess. 49, *reprinted in* 1967 U.S.C.C.A.N. 27340, 2780; Dobray, *Constitutional and Statutory Rights to Remedial Language Instruction: Variable Degrees of Uncertainty*, 15 St. Mary's L.J. 253, 267 (1984).)

124/ Pub. L. No. 90-247, 81 Stat. 783, 816 (codified as amended at 20 U.S.C. §§ 3221-61 (1988)).

with limited-English proficiency ("LEP"). The Bilingual Education Act encouraged schools to provide bilingual language assistance, but left the devising of the specifics of the programs to the discretion of the individual school districts. 125/

Another major step towards the development of bilingual education in this country came in 1974 with the Supreme Court's Lau v. Nichols decision. 126/ In Lau, the Court ruled that the failure of the San Francisco school system to provide special language instruction to non-English proficient Chinese students violated title VI of the Civil Rights Act of 1964, which bans discrimination "on the grounds of race, color, or national origin" in "any program or activity receiving Federal financial assistance." 127/ The Court stated that:

> [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. 128/

125/ Arington, supra note 30, at 342.

126/ 414 U.S. 563 (1974).

127/ 42 U.S.C. § 2000(d).

128/ Lau, 414 U.S. at 566.

The Court also noted the effects of a school system's failure to provide special bilingual instruction:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. . . . [T]hose who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful. 129/

Congress subsequently codified the Lau ruling in Section 1703(f) of the Equal Education Opportunities Act of 1974. This Act prohibits any state from denying equal opportunity to individuals on account of race, color, sex, or national origin, and requires schools to provide special educational assistance for language minority students "to overcome language barriers that impede equal participation . . . in its instructional programs." 130/ Although Section 1703(f) still permits states and school districts to determine the particular form that bilingual educational assistance will assume, this provision now imposes an affirmative obligation on

---

129/ Id.

130/ 20 U.S.C. § 1703(f) (1988).

schools to provide some kind of "fair and effective" special language instruction to non-English proficient students. 131/

Bilingual education, as currently outlined under federal law, is transitional in nature. 132/ Schools are supposed to end bilingual instruction within one to three years, and indeed, the majority of students are mainstreamed into English-only classrooms within this period of time. The most effective combination of native-language and English-language instruction for school districts to implement has, however, been the subject of considerable academic and political debate. 133/ Some studies have revealed that more

---

131/ Title VI does not strictly require bilingual assistance; instead, courts must adjudicate on a case-by-case basis the "appropriateness" of school boards' remedial programs in light of Section 1703(f). See Castaneda v. Pickard, 648 F.2d 989, 1008-1010 (5th Cir. 1981); see also Note, supra note 59, at 1352.

132/ Califa, supra note 10, at (citing Association for Supervision and Curriculum Development, Building an Indivisible Nation: Bilingual Education in Context (1987)). In this context, transitional bilingual education is defined as follows:

> Instruction in the content areas is offered in the students' native language for a limited time (usually two or three years), while the students are learning English. As soon as they're judged ready to be taught in English alone, they are placed in mainstream classrooms with native English-speaking students. Id.

133/ Califa, supra note 10, at 308.

extensive instruction provided in the student's native language better enables the student to perform in other subjects. 134/ Furthermore, a student's acquisition of a developed understanding of her native language actually facilitates the learning and understanding of a second language. 135/ Additionally, bilingual instruction enables the student to acquire substantive knowledge in other course areas while she is learning English. 136/ While this evidence may not call for

---

134/ Id. (citing Association for Supervision and Curriculum Development, Building an Indivisible Nation: Bilingual Education in Context 21 (1987)).

135/ Id.

136/ Logically, knowledge transfers easily from one language to another (for example, a student need not re-learn in English the mathematic principles that she has mastered in a math class taught in her native language). Hence, if non-English proficient students are receiving instruction in their native language, they are less inclined to fall behind in their education while they are learning English. Therefore such students are more successful academically in bilingual programs than in English-only classrooms. See id. (citing, "Newscenter Five Checkpoint: Bilingual Education" (WCVB television broadcast, Feb. 26, 1989) as authority for the following statistics: Latino children in English-Only programs have the highest drop-out rate in Boston (54% and rising). In contrast, the drop-out rate for students in bilingual programs is below 40% (the city average). In spite of these advantages, the Committee on Labor and Human Resources has refrained from endorsing any particular approach to bilingual instruction.

[Footnote continued]

mandating these particular approaches to bilingual education, it at least calls for allowing local school officials to implement them voluntarily.

Many English-only proponents, however would prohibit bilingual instruction in any other substantive course areas such as mathematics and science. Native-language instruction would be permissible only to the extent necessary to make a student proficient in English. 137/ Non-English speakers essentially would be precluded from any effective education in

---

136/ [Footnote continued]

Rather, the Committee has summarized Congress' position (to the extent one can be ascertained) as follows:

> Positions range from strong support of transitional bilingual education, an approach that employs instruction in the student's native language at the beginning and increases the use of English as time goes by, to strong support of methods which rely solely on English to teach the students. . . . Rather than endorsing a particular approach or debating the merits of each type of language instruction, the Committee believes that there is a need for greater flexibility at the school district level. (emphasis added).

Id. at 309 (citing, S. Rep. No. 92, 100th Cong., 1st Sess. 4 (1987).

137/ Id. at 309 (citing, S. Rep. No. 92, 100th Cong., 1st Sess. 4 (1987).

other subjects until after they had acquired proficiency in English. 138/

The primary purpose of bilingual education is to teach English to students who are not proficient in English. English-only proponents maintain that any native-language instruction beyond that necessary to instruct a non-English speaker in acquiring English proficiency serves only as a disincentive to learning English. The cynicism underlying this position lies in the fact that any reduction in bilingual instruction, in reality, would frustrate the ends purportedly hailed by the English-only movement -- i.e., teaching non-English speakers English, 139/ which could only serve to aggravate the impediments already faced by language minority students as a result of funding inequities and ethnic isolation in our public schools. In combination, many language minority students today thus still receive "grossly deficient" educational opportunities that renders language assistance in voting even more important if these deficiencies are ever to be overcome.

138/ See Lau, 414 U.S. 563.

139/ Califa, supra note 10, at 342.

2. Employment, Housing, and Health

Continuing discrimination against members of language minority groups in the United States in employment, housing, health care, and in other respects also creates direct and indirect barriers to political participation and, more specifically, to voting. Discrimination in obtaining employment, which can directly deprive members of language minority groups of, among other things, the means necessary merely to travel to the polls on election day, is still pervasive: Studies conducted in San Diego and Chicago in 1989 indicate that Anglos receive one-third more job interviews and half again the number of job offers as similarly situated Hispanics. In fact, Hispanics "better" Anglos only in encountering -- three times as often -- *un*favorable or hostile treatment in the hiring process. 140/ Hispanics are by no means the only language minority group to be so affected: the GAO has found that nearly three out of every ten Los Angeles employees have applied discriminatory hiring practices to Asian

---

140/ *See* Molina Statement, *supra* note 107, at 2-3 (citing General Accounting Office, *Immigration Reform: Employee Sanctions and the Question of Discrimination* (hereinafter cited as "*GAO Immigration Reform Report*") (March 1990)).

Americans as well as Hispanics since the enactment of the Immigration Reform and Control Act of 1986. 141/

Language minority groups also encounter discrimination in securing housing or other shelter. Late last year, the Federal Reserve Board reported that the home loan mortgage application denial rates of language minority group members for FHA and VA loans in 1990 ranged from 6% greater than Anglos for Asian/Pacific Islanders, to 52% greater than Anglos for Hispanics, to 86% greater than Anglos for Native Americans/Alaskan Natives. 142/ Moreover, the housing that many impoverished members of language minority groups do find too often is substandard in the extreme. See, e.g. Gomez v. Chody, 867 F.2d 395, 397 (7th Cir. 1989) (apartment in DuPage County, Illinois -- 95% of the residents of which were Hispanic -- found to be "in an advanced state of dangerous disrepair, unsanitary, and infested with insects and rodents").

Basic health care is another critical respect in which members of language minority groups are significantly worse off

---

141/ See id. at 3 (citing GAO Immigration Reform Report at 38).

142/ See Fed. Res. Bull. 870 (Nov. 1991). See also Molina Statement, supra note 107, at 3 (citing 1991 U.S. Department of Housing and Urban Development statistics showing that Hispanic buyers and renters experience discriminatory treatment in at least half of their encounters with real estate agents).

than the average American. For example, one-third of all Hispanics in the United States -- i.e., three times the rate as among Anglos -- have no health insurance at all. 143/ This high rate of noninsurance is a result both of higher relative unemployment as well as disproportionately high employment in

---

143/ See Statement of Eleanor Chelimsky, GAO Assistant Comptroller General, Program Evaluation and Methodology Division, before the House Select Comm. on Aging and the Cong'l Hispanic Caucus, Hearing on Hispanic Access to Health Care (Sept. 19, 1991), at 1, 10. More recently, Congressman Jose E. Serrano (D-NY) characterized the poverty experienced by Hispanics in his district as follows:

> Discrimination in housing, education, health care and employment continues to exist. One need go no farther than my district to see the pervasive, discouraging, traumatic effects of discrimination in the lives of thousands of American citizens. One out of four babies that are born in my district test positive for the HIV virus. My district has more babies born addicted to crack than any other place in the nation. Sixty-two percent of all young people in my district do not graduate from high school. there are 125,000 individuals waiting to move up from rat-infested apartments into public housing. This tragedy is repeated in minority communities throughout the nation, and continues to subvert the fundamental guarantee of our constitution of the right to vote. There is little question that the provisions of section 203 are today as relevant, if not more, than they were when adopted in 1975.

Serrano Statement, supra note 116, at 17.

jobs that do not provide health benefits. 144/ In conjunction with the fact that more than one-fourth of all Hispanics in the country lived in poverty in 1989 (approximately the same rate as in 1980, and more than double the non-Hispanic rate), 145/ Hispanics accordingly, as a group, reflect a markedly different health profile than Anglos -- dying far more often from accidents, homicides, AIDS, diabetes, cirrhosis and other liver diseases, and perinatal conditions; and suffering far more often from these conditions as well as hypertension, hyperlipidemia, hyperglycemia, cardiopulmonary problems, stroke, obesity, and certain types of cancer. 146/ Even where Medicaid coverage would otherwise be available to fill at least some of this health care "gap," the complexity of the Medicaid

---

144/ *See* Testimony of Eleanor Chelimsky, *supra* note 143, at 1, 12-18.

145/ *See id*. at 4

146/ *See id*. at 8. These afflictions may be further aggravated by the inequitable and ultimately discriminatory distribution in this country of environmental risks. *See*, *e.g.*, Environmental Protection Agency Environmental Equity Workgroup, *Environmental Equity: Reducing Risks to All Communities* (February 1992 Draft Report) (finding, for example, a substantially higher proportion of Hispanics than Anglos and even African-Americans to be exposed to particulate matter, carbon monoxide, ozone, and lead air pollutants, *id*. at 14-15; also noting that Native American reservations "often lack the physical infrastructure, institutions, trained personnel, and resources necessary to protect their members" from environmental risks, *id*. at 4).

system and the existence of serious language barriers -- just as with voting -- can make access even to publicly funded health care difficult for language minority persons. 147/

Subject to such a range of pervasive disadvantages -- too often the result of discrimination -- in these critically important areas, members of language minority groups must contend with "often insurmountable cultural disorientation" 148/ blocking the road to realization of the full benefits of citizenship. Poverty, isolation, and social and cultural dislocation are factors that significantly deter many American citizens who are members of language minority groups from participation in the political process -- a non-participation that ultimately only makes more difficult the effort to overcome the disadvantages. 149/ Any reasonable measures -- such as language assistance in voting -- that are

---

147/ *See id*. at 32-33.

148/ *see Graves v. Barnes*, 343 F. Supp. at 730.

149/ This relationship between effective political access and redressing other disparities was noted by Supervisor Gloria Molina, who testified that, after her election to the Los Angeles County Board of Supervisors as its first elected Hispanic member in history, the Board has "realigned spending priorities" and made the funding of health care -- and of the primary concerns of the Hispanic community -- a significantly higher priority. *See* Molina Statement, *supra* note 107, at 7.

available to promote fuller political participation and integration of language minority groups can only serve to benefit the entire nation. 150/

CONCLUSION

Yee Soo is an immigrant to this country from the People's Republic of China. She is a senior citizen who had been a university professor in her old country. Now on the verge of becoming a citizen of the United States of America, she made this plea at a community forum held in January 1992 in San Francisco, California:

> My name is Yee Soo. I often participate in sponsored self-help activities for the elderly. At the senior center, I have come to learn a lot about our government's policies and their effects on my family and community. We seniors are very active in participating at the various public hearings to express our concerns and needs.
>
> In six months, I will be taking my citizenship test. . . . In my mother country, there was no voting. In America, I hope to have the chance to vote for the first time.

150/ See also Dunne Statement, supra note 19, at 11 ("[I]n spite of the gains that have been made, voter turnout among Hispanics [as an example] still lags well behind that of our majority citizens. Obviously, there are many reasons for this gap, including age, economic status, and education, but the persistence of this gap cautions strongly against terminating language assistance that may contribute to overcoming it.").

> My senior friends tell me there are Chinese language materials to help people like me to vote. I urge the community leaders to urge the government to continue the Chinese language assistance. I look forward to the day that I can vote in America, just like other Americans. Thank you. 151/

The 1975 analysis by MALDEF of the impediments to voting that confront language minorities in this country was

---

151/ Statement of Mrs. Yee Soo before the Bay Area Asian American Community Forum on Language Rights (translated from the original Mandarin Chinese by Ms. Yvonne Y. Lee, National Executive Director of the Chinese American Citizens Alliance) (January 11, 1992). The "Chinese language assistance" in San Francisco presently offered to persons like Yee Soo is provided today solely at the sufferance of the city. As originally enacted in 1975, section 203 of the Voting Rights Act required San Francisco -- against its will at first, and only as a result of one of the five section 203 compliance suits ever filed by the Justice Department, see supra note 55 -- to offer language assistance to both Chinese- and Spanish-speaking citizens in the city. See United States v. City and County of San Francisco, Civ. No. C-78 2521 CFP (N.D. Cal. consent decree entered by three-judge court May 19, 1980). The "Nickles Amendment," however, enacted in 1982, see supra note 2, dropped San Francisco and 208 other counties or parts of counties from the Act's requirement of language assistance. Although San Francisco since 1982 nevertheless has voluntarily continued to offer some forms of language assistance, see supra p. 60, the enactment of California's "Official English" state constitutional amendment poses a very tangible and present threat to the ability of a jurisdiction like San Francisco to even volitionally offer any form of language assistance in voting. See supra note 107. Congressional expansion of coverage of the language assistance provisions (by the establishment of alternative "benchmark" thresholds and/or repeal of the Nickles Amendment, for example) to cover San Francisco and other jurisdictions with sizeable language minority populations thus would indeed secure for an additional fifteen years the continuation of Chinese language assistance in San Francisco.

limited in scope primarily to documenting and analyzing abuses against Hispanics in Texas, due for the most part to limitations in the data that then existed. The problems that are addressed by the language assistance provisions of the Act, however -- as this Memorandum has sought to make clear -- are not (and indeed never were) so ethnically or geographically limited. Given the impediments still posed by the continuing legacy of historical discrimination against language minorities in this country, compounded in many places now by state or local English-only laws, a strong consideration in favor of the reauthorization and expansion of section 203 of the Voting Rights Act must be the critical need to ensure that the gains that have been made to date in assisting language minorities to vote are not now lost.

Today, with the need as great or greater than it was in 1975, MALDEF asks the 102nd Congress to reaffirm its commitment to equal access to voting by renewing, for an additional fifteen years, and expanding in scope its previous extension of the benefits of the Voting Rights Act of 1965 to language minorities throughout the United States. In this way, Congress will continue important protections for the rights of non-English speaking citizens that have been only effective remedies it has yet devised and implemented to the impediments faced by Yee Soo and other language minority persons in the United States with respect to their right to vote.

Respectfully submitted,

David S. Tatel
John C. Keeney, Jr.
Ignacia Moreno Bish
Melissa R. Jones
Kevin J. Lanigan
Timothy F. Mellett
Sara Slaff
Emily S. Uhrig
Christine A. Varney
HOGAN & HARTSON

Attorneys for the Mexican-American Legal Defense and Educational Fund, Inc. 152/

17911/83730

152/ MALDEF also expresses its appreciation for the invaluable assistance in the preparation of this Memorandum and related materials rendered by Jeff C. Mang, Hogan & Hartson's Legislative Services Manager. Also making significant contributions to the preparation of this Memorandum were Hogan & Hartson's Foreign Legal Specialist, Mijke Ketting; three students who worked with the firm during the Summer of 1991 -- Michelle Alexander (Stanford Law School), David Newmann (University of Michigan School of Law) and Mark Lattimore (University of North Carolina); and legal assistants Julia Perkins and Larry Fauth.

JURISDICTIONS COVERED UNDER THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT OF 1965[1]

I. All Jurisdictions Covered Under Section 4(f)4

Jurisdiction	Language
ALASKA:	Alaskan Natives [2](Statewide)
ARIZONA:	Spanish heritage [3](Statewide)
Apache County	American Indian
Coconino County	American Indian
Navajo County	American Indian
Pinal County	American Indian
CALIFORNIA:	
Kings County	Spanish heritage [4]
Merced County	Spanish heritage
Yuba County	Spanish heritage
FLORIDA:	
Collier County	Spanish heritage
Hardee County	Spanish heritage [4]
Hendry County	Spanish heritage
Hillsborough County	Spanish heritage
Monroe County	Spanish heritage
MICHIGAN:	
Allegan County: Clyde Township	Spanish heritage [4]
Saginaw County: Buena Vista Township	Spanish heritage
NEW YORK:	
Bronx County	Spanish heritage [4]
Kings County	Spanish heritage [4]
NORTH CAROLINA:	
Jackson County	American Indian
SOUTH DAKOTA:	
Shannon County	American Indian [4]
Todd County	American Indian [4]
TEXAS:	Spanish heritage [5](Statewide)

---

[1] Source: 28 C.F.R. pt 55, appendix (1991)

[2] Five census areas in Alaska and the North Slope Borough also are currently "double" covered for Alaskan Native voters, by operation of Section 203

[3] Six counties in Arizona also are currently "double" covered for Spanish heritage voters, by operation of Section 203

[4] Jurisdiction is also currently "double" covered for language minority groups shown, by operation of Section 203

[5] One hundred-six counties in Texas also are currently "double" covered for Spanish heritage voters, by operation of Section 203

II. Jurisdictions Covered Only Under Section 203(c)

Jurisdiction	Language
ALASKA:	
Yukon-Koyukuk Census Area	American Indian
CALIFORNIA:	
Fresno County	Spanish heritage
Imperial County	Spanish heritage
Kern County	Spanish heritage
Madera County	Spanish heritage
San Benito County	Spanish heritage
Tulare County	Spanish heritage
COLORADO:	
Alamosa County	Spanish heritage
Archuleta County	Spanish heritage
Bent County	Spanish heritage
Conejos County	Spanish heritage
Costilla County	Spanish heritage
Huerfano County	Spanish heritage
Las Animas County	Spanish heritage
Otero County	Spanish heritage
COLORADO (con't)	
Pueblo County	Spanish heritage
Rio Grande County	Spanish heritage
Saguache County	Spanish heritage
CONNECTICUT:	
Fairfield County - Bridgeport Town	Spanish heritage
Hartford County - Hartford Town	Spanish heritage
FLORIDA:	
Dade County	Spanish heritage
HAWAII:	
Hawaii County	Asian American
Kauai County	Asian American
Maui County	Asian American
IDAHO:	
Minidoka County	Spanish heritage
MASSACHUSETTS:	
Essex County: Lawrence City	Spanish heritage
Hampden County: Holyoke City	Spanish heritage
Suffolk County: Chelsea City	Spanish heritage

Jurisdiction	Language
MICHIGAN:	
Allegan County: Fennville City	Spanish heritage
Newaygo County: Grant Township	Spanish heritage
MONTANA:	
Rosebud County	American Indian
NEW JERSEY:	
Hudson County	Spanish heritage
Passaic County	Spanish heritage
NEW MEXICO:	
Bernalillo County	Spanish heritage
Chaves County	Spanish heritage
Cibola County	American Indian, Spanish heritage
Colfax County	Spanish heritage
De Baca County	Spanish heritage
Dona Ana County	Spanish heritage
Eddy County	Spanish heritage
Grant County	Spanish heritage
Guadalupe County	Spanish heritage

Jurisdiction	Language
NEW MEXICO (con't)	
Harding County	Spanish heritage
Hidalgo County	Spanish heritage
Lincoln County	Spanish heritage
Luna County	Spanish heritage
McKinley County	American Indian
Mora County	Spanish heritage
Quay County	Spanish heritage
Rio Arriba County	Spanish heritage
Roosevelt County	Spanish heritage
Sandoval County	American Indian, Spanish heritage
San Juan County	American Indian
San Miguel County	Spanish heritage
Santa Fe County	Spanish heritage
Socorro County	American Indian, Spanish heritage
Taos County	Spanish heritage
Torrance County	Spanish heritage
Valencia County	Spanish heritage

Jurisdiction	Language
NEW YORK:	
New York County	Spanish heritage
NORTH DAKOTA:	
Rolette County	American Indian
Sioux County	American Indian
OKLAHOMA:	
Adair County	American Indian

Jurisdiction	Language
SOUTH DAKOTA:	
Buffalo County	American Indian
Dewey County	American Indian
UTAH:	
San Juan County	American Indian
WISCONSIN:	
Jackson County: Komensky Town	American Indian
Portage County: Pine Grove Town	Spanish heritage
Sawyer County: Couderay Town	American Indian

CURRENT STATUS OF VOTING RIGHTS ACT LANGUAGE ASSISTANCE COVERAGE IN JURISDICTIONS WITH ENGLISH-ONLY OR OFFICIAL ENGLISH LAWS

I. ENGLISH - ONLY AND OFFICIAL ENGLISH LAWS [1]				II. SECTION 4(f)4 COVERAGE [2]	III. SECTION 203(c) COVERAGE [2]
	A	B	C		
	Contains Official English Formulation	Contains Official English Formulation with Empowering Legislation and/or Private Right of Action	Contains English-Only Formulation Restricting Uses of Other Language		
ALABAMA 1989 Ala. Acts. 89-461 (Amending the Alabama Constitution of 1901.)		X		None	None
ARIZONA Ariz. Const. art. XXVII, § 1 (1988)			X	SH	
Apache County				AI	AI
Cochise County					SH
Coconino County				AI	AI
Graham County					SH
Greenlee County					SH
Navajo County				AI	AI
Pinal County				AI	SH
Santa Cruz County					SH
Yuma County					SH
ARKANSAS Ark. Code Ann. § 1-4-117 (1987)	X			None	None

---

[1] The essential provisions of the laws categorized on this chart are set forth in the Appendix to this chart, beginning at page 5.

[2] **Coverage Key:**
SH - Spanish Heritage
AI - American Indian
AA - Asian American

I. ENGLISH - ONLY AND OFFICIAL ENGLISH LAWS (cont'd)

	A	B	C	II. SECTION 4(f)4 COVERAGE	III SECTION 203(c) COVERAGE
	Contains Official English Formulation	Contains Official English Formulation with Empowering Legislation and/or Private Right of Action	Contains English-Only Formulation Restricting Uses of Other Languages		
CALIFORNIA Cal. Const. art. III, § 6 (1986)		X			
City of Fillmore Fillmore, Cal. Res. 85-1357 (1985)	X				
Fresno County					SH
Imperial County					SH
Kern County					SH
Kings County				SH	SH
City of Los Altos Los Altos, Cal. Res. 86 (1985)	X				
Madera County					SH
Merced County				SH	
San Benito County					SH
Tulare County					SH
Yuba County				SH	
COLORADO Colo. Const. art. II, § 30a (1988)		X			
Alamosa County					SH
Archuleta County					SH
Baca County					SH
Conejos County					SH
Costilla County					SH

BEST COPY AVAILABLE

I. ENGLISH - ONLY AND OFFICIAL ENGLISH LAWS (cont'd)	A	B	C	II. SECTION 4(f)4 COVERAGE	III SECTION 203(c) COVERAGE
	Contains Official English Formulation	Contains Official English Formulation with Empowering Legislation and/or Private Right of Action	Contains English-Only Formulation Restricting Uses of Other Languages		
Huerfano County					SH
Las Animas County					SH
Otero County					SH
Pueblo County					SH
Rio Grande County					SH
Saguache County					SH
FLORIDA Fl. Const. art. 2, § 9 (1988)		X			
Collier County				SH	
Dade County Dade County, Fl. Code § 2-11-15 (1984)			X		SH
Hardee County				SH	SH
Hendry County				SH	
Hillsborough County				SH	
Monroe County				SH	
GEORGIA Ga. Comp. R. & Regs. r. 70 (1986)	X			None	None
HAWAII Haw. Const. art. XV, § 4 (1978)	X[1]				
Hawaii County					AA

---

[1] Both English and Hawaiian are designated as "official" languages.

BEST COPY AVAILABLE

I. ENGLISH - ONLY AND OFFICIAL ENGLISH LAWS (cont'd)				II. SECTION 4(f)4 COVERAGE	III. SECTION 203(c) COVERAGE
	A	B	C		
	Contains Official English Formulation	Contains Official English Formulation with Empowering Legislation and/or Private Right of Action	Contains English-Only Formulation Restricting Uses of Other Languages		
Kauai County					AA
Maui County					AA
ILLINOIS Ill. Ann. Stat. ch. 1, para. 3005 (1969).	X			None	None
INDIANA Ind. Code § 1-2-10-1 (1984).	X			None	None
KENTUCKY Ky. Rev. Stat. Ann. § 2013 (1985).	X			None	None
MASSACHUSETTS					
City of Lowell: Non-binding referendum passed in 1989	X				
MISSISSIPPI Miss. Code Ann. § 3-3-31 (1987).	X			None	None
NEBRASKA Neb. Const. art. 1, § 27 (1920).			X	None	None
NORTH CAROLINA N.C. Gen. Stat. § 145-12 (1987).	X				
Jackson County				AI	
NORTH DAKOTA N.D. Cent. Code § 54-02-13 (1987).	X				
Rolette County					AI
Sioux County					AI
SOUTH CAROLINA S.C. Code Ann. § 1-1-696 - 1-1-698 (Law Co-op 1987).			X	None	None
TENNESSEE Tenn. Code Ann. § 4-1-404 (1984).			X	None	None
VIRGINIA Va. Code Ann. § 22.1-212.2 (1981).			X	None	None

ENGLISH-ONLY AND OFFICIAL ENGLISH LAWS SUMMARIZED

	A	B	C
	Contains Official English Formulation	Contains Official English Formulation with Empowering Legislation and/or Private Right of Action	Contains English-Only Formulation Restricting Use of Other Languages
ALABAMA 1989 Ala. Acts 89-461 (amending the Alabama Constitution of 1901).		• English is the official State language • Legislature shall enforce section by legislation • Legislature shall act to preserve English as common state language • Individuals can sue state to enforce amendment	
ARIZONA Ariz. Const. art. XXVIII, § 1 (1988).			• (1) The English language is the official language of the State of Arizona. • (2) As the official language of this state the English language is the language of the ballot, the public schools and all government functions and actions. • (3)(a) This article applies to: (i) the legislative, executive and judicial branches of government. (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities. (iii) all statutes, ordinances, rules, orders, programs and policies. (iv) all government officials and employees during performance of government business.
ARKANSAS Ark. Code Ann. § 1-4-117 (1987).	• English shall be the official language of the State of Arkansas. • This section shall not prohibit the public schools from performing their duty to provide equal educational opportunities to all children.		
CALIFORNIA Cal. Const. art. III, § 6 (1986).		• English is the official language of the State of California. • Legislature shall enforce this section by appropriate legislation. • The Legislature shall act to preserve English as common language of the State of California. • Individuals can sue to enforce this section in the State of California.	
City of Fillmore Fillmore, Cal. Res. 85-1327 (1985).	• English is the official language of the City		
City of Los Altos Los Altos, Cal. Res. 86 (1985).	• English is the official language of the City		
COLORADO Colo. Const. art. II, § 30a (1988).		• English is the official language of the State of Colorado. • This Section is self-executing, however, the General Assembly may enact laws to implement this section.	

	A	B	C
	Contains Official English Formulation	Contains Official English Formulation with Empowering Legislation and/or Private Right of Action	Contains English-Only Formulation Restricting Uses of Other Languages
FLORIDA Fl. Const. art. 2, § 9 (1988).		• English is the official language of Florida. • The Legislature shall have the power to enforce this section by appropriate legislation.	
Dade County Dade County, Fl., Code § 2-11-19 (1984).			• English is the official County language • Expenditure of County funds for utilizing any language other than English or promoting any culture other than that of the U.S. is prohibited • All County governmental meetings, hearings and publications shall be in English only • Nothing shall prohibit any county action relating to: several medical services; several essential services to the elderly and the handicapped; several emergency services; promoting of worldwide tourism.
GEORGIA Ga. Comp. R. & Regs. r. 70 (1986).	• Designating the English as the official language of the State of Georgia; and for other purposes.		
HAWAII Haw. Const. art. XV, § 4 (1978).	• English and Hawaiian are the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law.		
ILLINOIS Ill. Ann. Stat. ch. 1, para 3005 (1987).	• The official language of the State of Illinois is English.		
INDIANA Ind. Code § 1-2-10-1 (1984).	• The English language is adopted as the official language of the State of Indiana.		
KENTUCKY Ky. Rev. Stat. Ann. § 2.013 (1984).	• English is designated as the official state language of Kentucky.		
MASSACHUSETTS			
City of Lowell Non-binding referendum passed on the ballot in 1989	• English shall be the official language of the City		
MISSISSIPPI Miss. Code Ann. § 3-3-31 (1987).	• The English language is the official language of the State of Mississippi.		
NEBRASKA Neb. Const. art. 1, § 27 (1920).			• The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language, in public, private, denominational and parochial schools.

	A	B	C
	Contains Official English Proclamation	Contains Official English Proclamation with Empowering Legislation and/or Private Right of Action	Contains English-Only Proclamation Restricting Uses of Other Languages
NORTH CAROLINA N.C. Gen. Stat. § 145-12 (1987).	• English is official language of North Carolina.		
NORTH DAKOTA N.D. Cent. Code § 54-02-13 (1987).	• The English language is the official language of the state of North Dakota.		
SOUTH CAROLINA S.C. Code Ann. § 1-1-696 - 1-1-698 (Law. Co-op 1987).			• English is the official State language • Neither the State nor any political subdivision thereof shall require, by law, ordinance, regulation, order, decree, program, or policy, the use of any language other than English; • provided, however, that nothing in §§ 1-1-696 through § 1-1-698 shall prohibit a State agency or a political subdivision of the State from requiring an applicant to have certain knowledge of a foreign language as a condition of employment where appropriate.
TENNESSEE Tenn. Code Ann. § 4-1-404 (1984).			• English is hereby established as the official and legal language of Tennessee. • All communications and publications, including ballots, produced by the governmental entities in Tennessee shall be in English, and instruction in public schools and colleges shall be conducted in English unless the nature of the course requires otherwise.
VIRGINIA Va. Code Ann. § 22.1-212.1 (1981).			• English shall be designated as the official language • School boards have no obligation to teach the standard curriculum in a language other than English, except for courses in foreign languages • School boards shall endeavor to provide instruction in English to promote the education of students for whom English is a second language

Mr. EDWARDS. George Tryfiates is the executive director of English First, an organization whose goal it is to make English the official language of the U.S. Government. We welcome you and you may proceed.

STATEMENT OF P. GEORGE TRYFIATES, EXECUTIVE DIRECTOR, ENGLISH FIRST

Mr. TRYFIATES. Mr. Chairman and members of the subcommittee, I'd like to thank you for inviting me today to testify before you on legislation to extend section 203.

English First members oppose bilingual ballots and other bilingual voting procedures. We consider these to be a perversion of the intent of the Voting Rights Act. The Voting Rights Act was Congress' response to invidious discrimination against racial minorities at the polling place. Obviously, a person's ability to understand English is not immutable in the way a person's race is. Thus, to use the Voting Rights Act to address these two widely disparate matters is foolish at best and dangerously divisive.

What has made America a nation that the world still looks to as a beacon of freedom has been its ability to be truly a nation of immigrants. America's position is partly a result of the benefits of a common language. Rather than impose bilingualism upon ourselves, in this case through bilingual ballots, we should emphasize what unites us, the English language. Bilingual ballots are counterproductive to this process.

I suspect that while disagreements may arise over certain issues related to the act, we all share a common goal: Preserving and protecting the democratic process that remains the envy of most of the world. That was, I believe, the intent of the original sponsors of the Voting Rights Act. However, bilingual ballot provisions are sometimes used in ways which are a clear affront to the principles of democracy. When Congress legislates in this area, it must be careful that, in the name of so-called fairness, it does not invite new corruptions of the democratic process or impose vast expenses upon States or candidates.

We do well to remember that not so long ago the U.S. Supreme Court was forced to decide whether a successful citizen ballot initiative in the State of Florida violated the Voting Rights Act because the petitions used to put the measure on the ballot were not translated into Spanish. This was not a use of the Voting Rights Act to protect the right of citizens to be heard. Instead, this was a case where an attempt was made to use the Voting Rights Act to deny the voice of the citizens of Florida who passed the ballot measure by a vote of 83 percent.

Furthermore, bilingual ballots are just one more way that well-meaning people hinder the progress of various ethnic groups in this Nation. Most Americans known intuitively that English is the language of this country and that those who do not learn it will be unable to take their rightful place in what remains the American dream. A 1990 poll reported in the Houston Chronicle found that 87 percent of Hispanics surveyed thought it their duty to learn English.

As you are well aware, bilingual ballots were not required by the Voting Rights Act until the 1975 amendments were added to it.

That it took a decade for Congress to legislate in this area indicates that the problem of the Spanish-speaker confronted with a ballot written in English was not of the same intensity as that of an African-American attempting to register to vote at a rural Mississippi courthouse in 1963.

Anecdotal evidence exists for virtually any point one might wish to prove. Before Congress works its will on this issue, I have no doubt you will hear—and, indeed, may already have heard—from those who claim to owe their political participation to bilingual ballots. I would suggest that such anecdotes do not demonstrate that a problem with English language voting materials was either widespread or even common.

Abigail Thernstrom's book, "Whose Votes Count?" demonstrates that the need for bilingual ballots was scarcely proven even in 1975. Now evidence is coming in that they may actually be harmful. As the Justice Department testified in Senate subcommittee hearings on this same issue, Federal monitors witnessed, "serious shortcomings, particularly in assistance provided to native Americans." Among these shortcomings were "incorrect and confusing explanations that left voters unable to cast informed ballots."

It seems clear to English First that the problems bilingual ballots were supposed to resolve were practically nonexistent and that the bilingual ballot solution may be creating an actual problem. Furthermore, a person who achieves citizenship, and thus the right to vote, is required in most cases to demonstrate competency in English. A policy of bilingual ballots begs the fundamental question: Should it be necessary for a person to understand English before he or she can participate in the political process? We believe that the answer to that question is yes, and most Americans would agree that the answer to that question is, yes, the responsibility is with the voter who already knows that he or she needs to learn English.

There are those who advocate much, much more by way of unreasonable policies in this area. Bilingual ballots are the first step down that road. If you agree that, yes, a person should understand enough English to be able to vote in that language, then you will act to remove the bilingual ballot requirements from the Voting Rights Act.

I thank you for your consideration.

Mr. EDWARDS. Well, thank you very much, Mr. Tryfiates.

[The prepared statement of Mr. Tryfiates follows:]

TESTIMONY OF

P. GEORGE TRYFIATES
EXECUTIVE DIRECTOR, ENGLISH FIRST

Mr. Chairman, Members of the Subcommittee, I want to thank you for inviting me to testify before you today on H.R. 4312. I am Executive Director of English First, an organization of citizens who wish to make English the official language of government in America.

English First members oppose bilingual ballots and all other government-sponsored bilingual voting procedures. We consider these to be a perversion of the intent of the Voting Rights Act. This bill's attempt to cover ever more jurisdictions only strengthens the mockery which Section 203 already has made of the intent of the Act.

The Voting Rights Act was Congress's response to invidious discrimination against racial minorities at the polling place. Obviously, a person's ability to understand English is not immutable in the way a person's race is. Thus, to use the Voting Rights Act to address these two widely disparate matters is at best foolish and dangerously divisive.

What has made America a nation that the world still looks to as a beacon of freedom has been its ability to be truly a nation of immigrants. Other nations marvel at how America is a place where all persons are encouraged to participate in the political process.

America's position is partly a result of the benefits of a common language. Nations which are multilingual in character experience nearly constant strife. The former Soviet Union and Yugoslavia are good examples of multilingual nations which are dividing themselves into more cohesive units. The best example, however, is right on our northern border.

From its founding Canada has been divided by language disputes between French and English speakers. In an attempt to bring about unity, a policy of compulsory bilingualism was instituted on the federal level through the Official Languages Act. That policy has caused more strife, not less.

We can learn from the Canadian example. Rather than impose bilingualism upon ourselves -- in this case through bilingual ballots -- we should emphasize what unites us: the English language. Bilingual ballots are counterproductive to this process.

In spite of its reputation for liberty, America does sometimes fall short of the lofty standards it sets for itself. That's why laws like the Voting Rights Act were passed: to ensure that American citizens were treated equally at the polling place.

There has been some controversy over aspects of the Voting Rights Act generally among organizations on both sides of issues under debate. But I would suspect that while disagreements may arise over certain issues, we all share a common goal: preserving and protecting the democratic process that remains the envy of most of the world. That was, I believe, the intent of the original sponsors of the Voting Rights Act.

However, bilingual ballot provisions are sometimes used in ways which are a clear affront to the principles of democracy. The right to vote is fundamental. When Congress legislates in this area, it must be careful that in the name of so-called "fairness" it does not invite new corruptions of the democratic process or vast expenses upon states or candidates.

We do well to remember that not so long ago, the United States Supreme Court was forced to decide whether a successful citizen ballot initiative in the state of Florida violated the Voting Rights Act because the petitions used to put the measure on the ballot were not translated into Spanish in 6 of the 67 counties in Florida covered by the Act (Delgado v. Smith, 88-1327).

This was not a use of the Voting Rights Act to protect the right of citizens to be heard. Instead, this was a case where an attempt was made to use the Voting Rights Act to deny the voice of the citizens of Florida, who passed the ballot measure by a vote of 83%.

A similar attempt was made in Colorado to use the Voting Rights Act to prevent an election rather than to promote the rights of citizens to vote. Though ultimately unsuccessful, Montero v. Meyer, 88-2469 & 88-2470, nearly derailed Colorado's official English referendum. A judge initially threw out well over half the names required to certify a referendum question on the ballot.

Obviously, since the measures in question were official English amendments to the Florida and Colorado Constitutions, we at English First had an interest in these cases. But every citizen, particularly those many African-American citizens who suffered so long without the right to vote, has an interest in seeing that those who would use the Voting Rights Act as a political weapon to overturn the results of fair elections -- indeed, to prevent a fair election from even taking place -- are not permitted to do so.

Furthermore, bilingual ballots are just one more way that well-meaning people hinder the progress of certain ethnic groups in this nation. Most Americans know, intuitively, that English is the language of this country and that those who do not learn it will be unable to take their rightful place in what remains the American dream. A 1990 poll reported in the Houston Chronicle found that 87% of Hispanics surveyed thought it their "duty to learn English."

The people most likely to understand the problems of bilingual ballots are precisely those who are bilingual. A recent book, The Bilingual Courtroom, suggests that there are many problems in translating legal language from English to another language, Spanish in this case. Sometimes there is literally no corresponding word in Spanish (or any other language) for an English word. And sometimes, a Spanish word which is used to mean the same thing as the English word also can mean something else entirely.

As a person who speaks and reads French well enough to have interned with the Canadian Parliament, I am well aware that this problem is not unique to English-Spanish translations. And herein lays a highway to abuses. There are even disputes among English speakers as to the meaning of a given ballot proposition.

When an issue is hotly contested there will be arguments as to the meaning of a ballot question. The main way these matters are policed is by the howls from the opposing side. Yet if persons who understand only Mandarin Chinese have a ballot question misrepresented to them in the Chinese press, the opportunity for the opposition to police these abuses is less likely to be available. Should the campaign become aware of the problem, the owner of the Mandarin paper may well refuse even paid advertising disputing the charge. This is hardly the road to a better-informed electorate.

Even the Justice Department has testified to the serious problems which bilingual ballot translations create. In Senate testimony on a related bill, John Dunne, the Assistant Attorney General for Civil Rights, revealed that federal monitors witnessed "serious shortcomings, particularly in assistance provided to Native Americans..." Among these shortcomings were "incorrect and confusing explanations that left voters unable to cast informed ballots."

When even the Justice Department recognizes that Section 203 causes "incorrect and confusing explanations," and that attempts to enforce the Section "[leaves] voters unable to cast informed ballots," a real question arises as to the wisdom of renewing the Section. If the treatment is equally as bad as the disease (if, indeed, there even is a "disease"), then we should be looking at other options.

The answer is not to renew the Section. Just the opposite. We should allow Section 203 to expire. Obviously, there is a point where this sort of service will no longer be necessary. This will serve to return responsibility to the voter to be well informed and remove the government from its sorry efforts to do so. To have the government trying to translate on the voter's behalf clearly has not improved the non-English speaking voter's ability to "cast informed ballots."

As you are well aware, bilingual ballots were not required by the Voting Rights Act until the 1975 amendments were added to it. That it took a decade for Congress to legislate in this area indicates that the problem of the Spanish-speaker confronted with a ballot written in English was not of the same intensity as that of an African-American attempting to register to vote at a rural Mississippi courthouse in 1963.

Anecdotal evidence exists for virtually any point one might wish to prove. Before Congress works its will on this issue, I have no doubt you will hear from someone who claims to owe his or her political participation to bilingual ballots. I would suggest that such anecdotes do not demonstrate that a problem with English-language voting materials was either widespread or even common.

Abigail Thernstrom's book, Whose Votes Count? demonstrates that the need for bilingual ballots was scarcely proven when they were first required. She notes on page 54:

> If the hearings were a staged event, the performance was less than perfect. "We were able to produce those [needed] horror stories," a MALDEF representative would later say. "But not many of them. . . . We did it really by the skin of our teeth."

And again on page 56:

> Many of the charges came from a handful of witnesses reporting on very few Texas counties . . . "What we found," one lobbyist later frankly admitted, "we portrayed . . . as a giant state-wide pattern, which it really wasn't."

Of course, there is some evidence of misrepresentation of the need for bilingual ballots by advocates of bilingual ballots. Consider the data offered by MALDEF in a 1982 study. (This is discussed at length in a 1988 Yale Law Journal article by Sandra Guerra, "Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens," 97 YALE L.J. (1988)).

The MALDEF report claimed bilingual ballots were essential for Hispanic voters. It reported that 70% of those citizens who spoke only Spanish would be less likely to register and vote if they could no longer get oral help in Spanish. Fully 72% of monolingual Spanish speakers claimed they would be less likely to vote if bilingual ballots were discontinued.

It is not without interest that this same MALDEF "study" also claimed that fully 21% of citizens classified "English Monolingual" stated they would be "less likely" to vote "without Spanish help" and 14% of the "English Monolinguals" supposedly were less likely to vote without a bilingual ballot. Why a substantial percentage of persons who speak just English needed "Spanish help" and bilingual ballots was not explained.

It seems clear to English First that the "problems" bilingual ballots were supposed to resolve were, and remain, practically non-existent. A person who achieves citizenship, and thus the right to vote, is unlikely indeed to have absolutely no knowledge of the English language.

Indeed, and again I refer to Justice Department testimony on the Senate bill, there remains no outcry of injustice from the many additional jurisdictions which would be covered should H.R. 4312 become law. According to the Justice Department, "... we have not received significant numbers of complaints from these large jurisdictions. If such information were to come to our attention, we would, of course, examine it carefully."

Since there is evidently no problem, the expansion of covered jurisdictions is clearly unnecessary. Supporters of Section 203 suggest that a covered jurisdiction has by definition violated the rights of voters. Yet, some of the additional jurisdictions which H.R. 4312 seeks to cover already provide the supposed remedy required by the Section: multilingual assistance. Nonetheless, they are to come under the heavy hand of federal intervention. Again, I suggest such inconsistent reasoning makes a mockery of the very real problems which the Act was originally designed to address.

Government-written bilingual ballots are also unnecessary because of the active participation of non-governmental groups, such as political parties, in the election process. There is often a number of private sector volunteers making sure that voters receive literature on the way to the polls. Political parties in particular can be expected to print materials in what-ever languages the electorate requires even if the Voting Rights Act itself were to disappear.

Both the House and Senate bills contain an additional flaw. The Administration suggests that the Nickles amendment, added during the 1982 renewal, would not be a part of renewal unless it is specifically added to the legislation. If this is accurate, then H.R. 4312 not only radically expands the number of covered jurisdictions, it also would cover previously exempted jurisdictions. This is yet another case where jurisdictions are effectively "punished" without just cause. No showing has been made in these cases for coverage any more than in the cases of the additional jurisdictions targeted for coverage which I mentioned above.

A policy of bilingual ballots begs the fundamental question: Should it be necessary for a person to understand English before he or she can participate in the political process? We believe that the answer to that question is yes. And, most Americans would agree that the answer to that question is yes. The responsibility is with the voter who already knows that he or she needs to learn English.

Learning English is not an immutable disability in the same way that a physical handicap is. We make reasonable accommodations for those who are disabled because they have no choice about their condition. But one who cannot speak English does have a choice. We should encourage that one to learn English rather than patronize him with a bilingual ballot.

There are those who argue that bilingual ballots are not nearly enough. It is worth noting that this is precisely what is argued in Bill Piatt's book, Only English? on page 150:

> There may or may not be a right to be informed via broadcast media in a foreign language. As a result, while a voter arriving at the polls who suffers a language barrier may be entitled to a bilingual ballot, he or she may not understand the issues or the positions of the candidates upon which he or she is voting if the public affairs programming in the local media has been presented exclusively in English.

If we were to take this advice, the consequences would be unfortunate, but predictable. Resentment at the costs of a multi-language election process in which decisions can be regularly overturned by a judge in what is effectively an alliance with a numerically small special interest can only be expected to develop. The way to ensure that Americans continue to be supportive of immigration is clearly not to impose vast social and economic costs on Americans when the immigrants arrive.

If you agree that, yes, a person should understand enough English to be able to vote in that language, then you will act to remove the bilingual ballot requirements from the Voting Rights Act.

Thank you for your consideration.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Well, Mr. Chairman, I didn't make an opening statement and I shant, but I do want to share with the panel an excerpt from an article written in the Washington Post, August 6, 1990, by Charles Krauthammer. He expresses eloquently what really bothers me about this whole issue, and I want to just share it with you for your comment.

"One day's news: A prominent Tory MP is killed by an IRA car bomb. Government soldiers in Liberia murder hundreds of refugees from a rival rebel tribe. A radical Islamic sect in Trinidad kidnaps the Prime Minister and his Cabinet, holding them at gunpoint. American Indians demonstrate outside the Canadian Embassy in solidarity with Mohawks caught in a violent land dispute with Quebec, which itself is in an autonomy dispute with Canada.

"What connects these unconnected events? The powerful, often ignored global reality of tribalism. The Irish, Liberian, and Trinidadian version is more violent, but Canada illustrates best its bewilderingly regressive nature. Canadian nationalism has long sought to distinguish itself from the United States; Quebec nationalism to distinguish itself from Canada, and now here come the Mohawks with their own claim of apartness from Quebec. Tribes within nations within empires, the world is littered with such Chinese boxes, and they make perfect tinder for conflict, nowhere more so than in the Soviet bloc where the decline of communism has brought a revival of tribalism, most notably in Azerbaijan and Transylvania, as salvage and primitive as seen anywhere."

This was written before the Armenians and the Azerbaijanis were bombing and slaughtering and killing each other, and the Croatians and the Serbians were bombing and slaughtering and killing each other.

"What is all this to Americans? A lesson and a warning. America along, among the multi-ethnic countries in the world, has managed to assimilate its citizenry into a common nationality. We are now doing our best to squander this great achievement.

"Spain still has its Basque secessionists, France its Corsicans. Even Britain has the pull of Scottish and Welsh, to say nothing of Irish nationalists. But America has, through painful experience, found a way to overcome its centrifugal forces.

"American unity has been built on a tightly federalist politics and a powerful melting pot culture. More important, America chose to deal with the problem of differentness, ethnicity, by embracing a radical individualism and rejecting the notion of group rights. Of course, there was one great shameful historical exception, the denial of rights to blacks. When that was finally outlawed in the sixties, America appeared ready to resume its destiny, a destiny celebrated by the Reverend Martin Luther King, Jr., as the home of a true and now universal individualism.

"Why is this a destiny to be celebrated? Because it works. Because while Spain and Canada, to say nothing of Liberia and Ireland, are racked by separatism and tribal conflict, America has been largely spared. Its union is more secure than that of any multi-ethnic nation on earth."

This is the last paragraph that I will read to you. "We are now, however, in the process of throwing away this patrimony. Our great national achievement, fashioning a common citizenship and identify for a multi-ethnic, multi-lingual, multi-racial people is now threatened by a process of relentless, deliberate Balkanization. The great engines of social life—the law, the schools, the arts—are systematically encouraging the division of America into racial, ethnic, and gender separateness."

And, boy, is that true. Only a black can represent blacks; only a Hispanic can represent Hispanics. Women are the only spokesmen for women. This tribalism is pulling the country apart. We have a motto, "E pluribus unum." We can forget the "unum" now; it's all "pluribus."

I just view this as one more step. This isn't the end of the world or anything. And I used to support bilingual ballots. When this issue was up before Congress before, I thought it was an overheated issue. But now, as I see the pulling apart of this country and the world, I can't imagine why Croatians have to kill Serbians and Serbians have to kill Croatians, but this is one more step in the polarization of a country. And we should be looking for ways to bring us together, things we share in common.

Ms. Wolfley says the right to be an Indian and continue to be a part of a tribal community suggests the right to be different than the mainstream of America. Of course. If anybody wants to be different, they ought to be different in this great country, but cultural enclaves I don't think is what this country really is about. It's about the right to be different, but we ought to be looking for things to bring us together.

I'm just concerned that multilingual ballots in all of the myriad of languages that exist and are increasingly existing and dialects. I understand in Alaska there are numerous languages that are not even recorded, not even written. But I just think—I'm concerned about the polarization that's going on in the world, and it results in killing. It results in wars, in hatred, and the emphasis of the differentness. We ought to be looking for things to bring us together.

That's my statement. If anybody wants to comment on it, they're more than welcome. Thank you.

Mr. EDWARDS. Who would like to volunteer to respond to——

Dr. GARCIA. There may be several. There may be several individuals who may respond, but I'll be happy to respond to that. In reference to the article written, I think there are certain analogies that are being made about what transpired in terms of "tribalism" around the world that is certainly not applicable in the United States.

As it relates to our particular survey and a question we asked about how proud individuals are to be Americans, to be living in the United States, among our Latino respondents over 90 percent indicated extreme amount of pride at being a member of this society, of being a member of this country. Individuals were asked, how much do you love this country? Whether you're Spanish-speaking or English-speaking, we're talking about well over two-thirds of that response, closer to 80 percent, indicating extreme love for this country.

We also asked individuals about values. In fact, there's a certain irony in their responses because these individuals embrace the values of a society in terms of egalitarism, in terms of opportunity, in terms of freedoms, and yet in their own experiences may not necessarily have those opportunities to begin with. So you've got individuals who essentially internalized fundamental democratic values who are perhaps not necessarily participants of the benefits of life in the society, so that there are certain—the questions of differentness may not be there because this population tends to be very much as American in values, in orientation, and pride as mainstream Americans.

The last point in terms of the application of the Voting Rights Act, the Voting Rights Act, my understanding its intent was to provide some protections and provisions for groups who historically have been denied access to the ballots. So in some sense about the coverage issue, it should also encompass a sense of groups who have been historically denied access. So that the question about coverage, which implied all language groups, may be appropriate in some larger context, but we're talking about a Voting Rights Act that focuses on historically denied groups, and how do you facilitate that access? I suspect that we're talking about for the facilitation what perhaps after 15 years may be an irrelevant issue in terms of language provisions, but it seems to be still relevant in the 1990's.

Ms. WOLFLEY. I'd like to respond to that, the comments that were made in the article, also. First of all, I think that perhaps the person who wrote that article is somewhat naive about the Federal Indian policy in the United States. There has been an established Federal Indian policy between Indian tribes and the United States for over 500 years. That process has largely grown out of the treatymaking process that the United States had and recognized each tribe as separate sovereign governments.

There's no doubt that tribes have been represented as separate political communities, not necessarily minority ethnic communities, and I think that's one of the distinguishing features here, is that tribes as governments have been able to separate themselves from the United States, but at the same time have an ongoing relationship with the Federal Government. There has not been the polarization that was articulated in the article with Indian tribes and mainstream America. There has been assimilation, no doubt, of Indians into mainstream America, but at the same time Indians have been able to cling to their traditions and culture and maintain those, and they are workable. They are still working today.

Most of the Government meetings that are run for tribes are run in the language of that particular tribe. At the same time, they're spoken in English.

Mr. HYDE. You know, we have Lithuanian communities in Chicago, and, boy, they hang onto their cultural traditions. They dress in the costumes. They have festivals and everything. But I don't know that the ballots are printed in Lithuanian. They're not. They're able to vote in English and maintain their cultural traditions and even their language.

But, anyway, I didn't mean to interrupt you, but I just wanted to point out that you can maintain cultural traditions without necessarily having a bilingual ballot.

Ms. WOLFLEY. Well, actually, most of the voter assistance that is provided to Indian voters under the Voting Rights Act is not through ballots, written ballots, because the language is such an oral tradition, that many of the Indian tribes do not have written languages. So that the only assistance that is provided or is available would be through a voter clerk who is bilingual, and they necessarily could not have a bilingual ballot, or it wouldn't be required, just because of that.

Mr. HYDE. Thank you.

Mr. LANIGAN. Congressman Hyde, I'd like to make several points. I'll try to be brief in response to the article.

Mr. HYDE. Well, not at all. I was so prolix; you're entitled to.

Mr. LANIGAN. Thank you.

First of all, in the issue of the concern about group rights and tribalism, I think that that concern, at least applied in this context, gets the voting rights and language assistance backwards. I don't believe it's fairly portrayed as an affirmative assertion of a group right, but rather a remedy to the fact of proven historic discrimination by the majority in this country against persons simply because they're members of groups.

If you have a situation like that, I think the kinds of remedies we see here, including section 203, is the only way to address that. It's not the assertion of an affirmative group right, but rather the remedy to discrimination against members of a group.

Mr. HYDE. But doesn't it keep people further apart? Wouldn't some need to learn English be helpful in bringing people together, assimilating them into the greater society?

Mr. LANIGAN. Absolutely. And, again, there's no dispute. I'm sure that the Houston Post poll of 1990 was accurate. The existence of language assistance—and that 1990 poll was taken 15 years after language assistance was originally enacted—has not resulted in Hispanics deciding that, as a result of the fact that they get a bilingual ballot every 2 years, it's no longer important to learn English.

Mr. HYDE. Here's some fascinating figures, and if you'll indulge me, I'll promise I'll—San Francisco, 1983, 64 percent of voters in a referendum voted against bilingual ballots and asked Congress to repeal the law mandating them. California, 1984, 72 percent of voters in a statewide initiative voted against bilingual ballots and asked Congress to repeal the law mandating them. California, 1986, 63 percent of voters approved constitutional amendment making English the State's official language. Colorado, Arizona, Florida, 1988, voters of all three States decisively voted to make English their States' official language. Alabama, 1990, 90 percent of voters approved a constitutional amendment making English the State's official language. San Francisco Chronicle poll, March 1990, 90 percent of Filipino-Americans, 78 percent of Chinese-Americans, and 70 percent of Hispanic-Americans favored making English the official language.

These are facts and I don't believe in government by poll necessarily, but they sure are relevant to this issue.

Mr. LANIGAN. I think they're relevant to this issue in several respects. First of all, I think they indicate the, what would be, naivety in assuming that, absent the Federal mandate for language assistance, local officials would be likely to rush to voluntarily offer language assistance. The fact is that, to the extent there is countervailing Federal constitutional or statutory law, an initiative passed by the people of the State or locality, passed by a majority of the people of a State or locality that tramples the rights of minorities, is no more sacred than a measure passed by a legislature or local representatives.

And the fact that the majority in these States—and I'm from Arizona and was there when the English-only language amendment was enacted there—passed these provisions, I don't think is any argument for Congress not renewing section 203.

On the importance of learning English, again, there is no dispute that it's critical, and members of language minority groups realize that. What we see, though, there is testimony that it's purely a voluntary choice and the responsibility is with the voter to learn English if he is to fully participate.

Mr. HYDE. A lot of Polish people came over on the boat and couldn't speak English, but, boy, they learned. A lot of Greeks came over. I mean, I just—you know, I learned to swim when someone threw me in the water.

Mr. LANIGAN. Section 203, however, was premised on findings by the Congress, and findings that are still relevant today, that, for example, in States like Texas, Hispanic voters, Hispanic citizens, are still burdened by inequitable and segregated public education systems that have in whole or part contributed to the fact that many of those citizens today have limited English proficiency. I'm not aware that there's such evidence underlying Polish voters or Lithuanian voters in Chicago. There may or may not be. It wasn't submitted to Congress.

But that is——

Mr. HYDE. We never look at voting rights problems in Chicago, no.

[Laughter.]

Mr. HYDE. We just look in Alabama and Texas. We stay away from Chicago.

Mr. LANIGAN. I mean, to argue, though, that the burden is solely on the individual citizen to make sure he becomes fluent in English, I think misstates and misunderstands the problems that are out there in many States where the English language minorities are in terms of getting equal access to equal educational opportunities.

Congress can't—or at least it hasn't—taken upon itself the burden of, for instance, fixing the inequitable school finance system in Texas. What it can do is make sure that Hispanic voters in Texas, to the extent that they're burdened by limited proficiency that results from the inequitable education system there, still have effective access to the ballot.

Another point that was made that related to the group rights and tribalism, that the voting right is premised on the notion that only Hispanics can represent Hispanics and only a black can represent blacks, I think that's a popular understanding, but misses an important subtlety.

Mr. HYDE. That's how we draw the districts. We just went through reapportionment and, believe me, you'd better get 65 percent African-Americans here, 65 percent of Hispanics there, or the courts will strike it down. That's group entitlement.

Mr. LANIGAN. Well, but what the entitlement is to the individual minority voter is entitled to an equal opportunity with the Anglo voter to elect a representative of his or her choice. The representative of the choice of the minority voter need not be a minority candidate.

Mr. HYDE. But then you do agree that only an African-American can adequately represent an African-American population?

Mr. LANIGAN. No, I don't. I think that African-American voters are entitled to an equal opportunity to elect the representative of their choice. If that's an African-American candidate, that's fine; if it's not, that's fine also.

Mr. HYDE. All right, there's no point in arguing that. I hear you.

Dr. GARCIA. There is information that collaborates that, because we asked our respondents whether the individuals, if you had the opportunity to vote for members of your own ethnic group versus someone else, what difference does that make in your voting choice? Over half, whether you're talking about Cubans, Puerto Ricans, or Mexican-Americans, indicated that the ethnicity of the candidate did not make a difference in whom they would vote for. The second largest group would vote for the minority candidate, whoever was in there. But, again, these are voters making choices.

I think it sort of collaborates what was said earlier, that the opportunity to make those choices, because there is enough evidence to suggest that minority candidates are less likely to seek elective office if, in fact, there is not a substantial minority base in their district; it doesn't preclude the fact that a nonminority individual may be as good or better representative than a minority. It's the opportunity to make those kinds of choices which I think is very critical.

Mr. LANIGAN. I think, Congress, also—excuse me.

Mr. EDWARDS. I want to say the district that I represent is 35 percent Latino, 10 percent Asian, and 4 or 5 percent African-American, and we can't provide enough instruction in English. All want to learn English. The problem insofar as learning English is the fact that we don't have the resources or the teachers to provide it. They line up around the block to get into an English course.

The tribalism, the violent tribalism, in my district is the fact that there is a lot of discrimination, the kind of discrimination that exists when certain groups don't get a good education, don't get good adult supervision like families, we like to think that families can offer children. They don't have the opportunity to buy a house or to even rent something, or to get any kind of a decent job that will provide for that. That's the kind of tribalism. We don't get any tribalism insofar as the language. We revere the cultures of the Vietnamese, the Laotians, the Ecuadorans, the Mexicans, and it adds so much to our lives to have the restaurants, the music, the culture, and all the things that enrich the district that I represent.

I think it's really naive for anybody to come in and say that, because you wouldn't be able to vote unless you spoke English, that somehow or another that is going to drive you into an English class. I'm sure there are no statistics supporting that.

I understand these votes, and English-only is not the real subject of this, or English as the official language is not the real subject of these hearings. As you know, the subject of these hearings is the extension of the Voting Rights Act.

It always has made sense to me that you want people to understand the ballot. Why do you want to make it more difficult for them to understand these great issues that you vote on? That's not to say, we'll, make it tough on them so they'll learn English; that doesn't make that much sense to me.

Mr. LANIGAN. I think that's a critical point. There's been testimony that, for example, it should be necessary for a citizen to understand English before they're allowed to vote. But nonrenewal of section 203 wouldn't result in that.

Language assistance not only knocks down a deterrent to many language minority citizens to voting, but allows many others who do vote, whether there's language assistance or not, to cast a much more informed vote. I think everyone benefits by that.

Congressman Hyde indicated that he was searching for something that we could all share in common, something that would bring us together. I think Winston Churchill said that this was the only country that was founded upon an idea, the idea of self-government with participation by all.

What we can share and what can bring us together is participating in the electoral process. Language assistance allows many more people to do that.

The 1990 Krauthammer article, to the extent it kind of looked around the world and recited headlines that were occurring and supported this particular thesis of the day, I think he also could have looked in 1990, if I recall, to events that were unfolding in Rumania where the Government there was trying forcibly to stamp out the language of the Turkish minority, banning its use and education in the public schools; requiring many members of the Turkish minority to change their names to Rumanian names; and resulting in a lot of violence, a suppression of a culture, and ultimately, once the Government fell, to just wholesale flight from the country.

I think that everyone can go overboard in trying to reach for these international metaphors in looking at what we're doing here today, but I think that the effort to seek a national language in this country that's not been perceived as needed since the formation of the country, and the effort to not renew section 203, to the extent it springs from the same wellsprings, can also find a useful analogy in that experience.

Mr. EDWARDS. Well, thank you. You haven't had a real shot. Do you want to go?

Mr. TRYFIATES. I'd like to, if I may. I'd like to observe, first of all, that Mr. Krauthammer has done a very eloquent job of explaining the question of Balkanization. In the Senate subcommittee hearings it was suggested that Canada, for instance, was not applicable because the population of Quebec was concentrated in one area. The fact is I believe that Canada is very much applicable to this debate because the act itself creates 5 percent populations of Quebec all over the country.

In Canada, the example of official bilingualism compulsory and federally mandated has shown to us that bilingualism leads only to more and more division, more and more divisiveness. I think it's interesting that it is because of bilingualism in Canada that Quebec today is closer to separation than it ever has been in the past.

Second, when I say that Quebec is closer to separation than it has ever been in the past, I make the observation that it is the Quebec Liberal Party which is advocating a referendum on the issue this fall, and the liberal party has historically been in favor of Canadian federalism. In addition, it is Canadian bilingualism that brings us the specter of language police hunting down people ensuring that they are speaking both languages when it comes to the provision of federal services. The Voting Rights Act has an element of that in it, in the sense that the ballots and other voting materials must, indeed, be provided in more than one language.

If I may make one other point, that is the issue of the temporary nature of the Voting Rights Act and of the section 203. We've heard testimony today that more and more people are learning to speak English, and so the act, though, is still needed. It causes me to wonder why, if people are learning English, we are still insisting that section 203 and bilingual ballot provisions are necessary.

So those are two things that I would observe with respect to the Canadian bilingualism and the temporary nature of the act and of the section specifically.

Mr. EDWARDS. Well, thank you. And I won't bring up the question of the example of Switzerland where three languages are spoken and they live very happily together. Do you know why? Because they respect each other and because everybody is entitled to some kind of a job and a living and a place to live in Switzerland.

Mr. Kopetski, we welcome you.

Mr. KOPETSKI. Well, thank you, Mr. Chairman. I don't know; my folks, my heritage is Eastern European, and I have trouble with people that want us to all be white, all be Christian or all be speaking English—in the United States I just think that goes against everything that's American, but I guess I have a different outlook toward what the United States is all about than some of the people here.

So I've got to get an understanding here—Mr. Tryfiates, is it?

Mr. TRYFIATES. Right.

Mr. KOPETSKI. It's a great name. It's a rich name.

Now how important is voting on your scale in terms of being a citizen?

Mr. TRYFIATES. Before I answer the question, if I may, no one has suggested that everyone should be white, that everyone in the United States should be Christian. I think that one thing that has been very important with respect to the official language movement is the emphasis and the stress that is put on the importance of diversity, the importance of each person having the right and the ability to maintain his native language and culture.

The issue, as it again deals also with respect to section 203, is, what is the Government going to mandate; what is the fairness of the Government forcing bilingualism and multilingualism upon the Nation? That I think is the key question and that is why I brought up the Canadian example.

With respect to your question——

Mr. KOPETSKI. You just think everybody should speak English?

Mr. TRYFIATES. I think it's important that everyone learn to speak English, yes. But, again, you may choose to learn a foreign language, and I would applaud you in doing that. I think that is a natural, commonsense issue.

With respect to voting, I would observe that people who come to this country come voluntarily and understand——

Mr. KOPETSKI. No, no, no. Let's talk about somebody that is born here of parents who don't speak English.

Mr. TRYFIATES. Well, again——

Mr. KOPETSKI. And so they're already here and they're raised speaking a different language other than English. How important is voting to that person, in your mind?

Mr. TRYFIATES. I think voting is important to that person, but I also believe that learning to speak the English language is equally as important.

Mr. KOPETSKI. Just as important as voting?

Mr. TRYFIATES. The person needs to learn to speak English. And, indeed, most immigrants, whether a person is born here and is a citizen because of their birth or whether they have come voluntarily, recognizes the importance of English and seeks to learn to speak English. I think what people want is to learn to speak the English language and not receive a pat on the head with respect to bilingual ballots.

Mr. KOPETSKI. OK. Now, well, let's talk about this person growing up. They're born and raised in America and they don't speak English. Do you think they should vote?

Mr. TRYFIATES. I believe any citizen should vote.

Mr. KOPETSKI. Even these kinds of people?

Mr. TRYFIATES. Yes.

Mr. KOPETSKI. And do you think they should cast informed ballots?

Mr. TRYFIATES. Absolutely. I think the best way for that person to do that, to participate in the process, is to learn the English language. That's what that individual should be striving to do in the first place.

Mr. KOPETSKI. But let's suppose that they can't read the ballot. You think they should not vote at all?

Mr. TRYFIATES. I did not say that. I think a person should make every effort to learn exactly what's on the ballot——

Mr. KOPETSKI. No, no, that's not the question. Answer the question, please. The question is: Should they vote?

Mr. TRYFIATES. The person should, indeed, participate, yes.

Mr. KOPETSKI. They should vote?

Mr. TRYFIATES. They should make sure that they're as well informed as they possibly can be and that they cast an informed——

Mr. KOPETSKI. No, the question is: Should they vote? Yes or no, should they vote?

Mr. TRYFIATES. I think they should vote.

Mr. KOPETSKI. They should vote?

Mr. TRYFIATES. Yes, I think they——

Mr. KOPETSKI. Even if they can't understand what they're voting on, they should vote?

Mr. **Tryfiates**. I think that they should learn and should understand before they cast their ballot, which is what I've been trying to say, that an individual who wants to vote, wants to participate, wants to learn to speak the English language, that's——

Mr. **Kopetski**. Which is more important—let's go back to this—should they learn to speak English or should they vote?

Mr. **Tryfiates**. I think the two are tied together.

Mr. **Kopetski**. No, no, no. Oh, you think they're equally the same?

Mr. **Tryfiates**. I don't think they're equally the same. I think that in order to——

Mr. **Kopetski**. Which is more important?

Mr. **Tryfiates**. I think that in order to exercise the vote, the individual recognizes already that he needs to speak English.

Mr. **Kopetski**. I'm sorry, which is more important, speaking English or voting?

Mr. **Tryfiates**. I think they are linked.

Mr. **Kopetski**. No, no, no. First you said they were; then you said they weren't. Which is it?

Mr. **Tryfiates**. I think the two are linked. I think that a person——

Mr. **Kopetski**. They're equally the same?

Mr. **Tryfiates**. I didn't say that. I said they're linked. In order to exercise the right, you need to learn to speak the English language, and the individual recognizes that as well as you or I.

Mr. **Kopetski**. So you can't have one without the other? So you think that, in order to vote, you have to be required to speak English or to read English? Is that what you're saying?

Mr. **Tryfiates**. No, sir, I think the individual——

Mr. **Kopetski**. Well, you said they're linked.

Mr. **Tryfiates**. I said the individual already recognizes——

Mr. **Kopetski**. How are they linked? Who are they linked with?

Mr. **Tryfiates**. I think that an individual who is going to the polling place already recognizes that he needs to learn to speak English.

Mr. **Kopetski**. So that should be a prerequisite of voting in America?

Mr. **Tryfiates**. No, sir.

Mr. **Kopetski**. Well, you say they are linked. Who are they linked with?

Mr. **Tryfiates**. I think the individual recognizes that he needs to learn to speak the English language. A bilingual ballot does not assist him in doing that. He is not denied the right to vote because he speaks a foreign language. And if he is, it is not because of an immutable disability that the person has; it is because the person voluntarily does not learn to speak English. I think that's the issue, the immutable——

Mr. **Kopetski**. Sort of a personal literacy test? Is that what you're saying?

Mr. **Tryfiates**. No, sir. I——

Mr. **Kopetski**. No?

Mr. **Tryfiates**. The question comes down to the immutability characteristic.

Mr. **Kopetski**. I see. And they're not——

Mr. TRYFIATES. Language is not an immutable characteristic the way a person's race is.

Mr. KOPETSKI. And they're not going to be as good as citizens if they don't vote; is that what you're saying?

Mr. TRYFIATES. No, I don't believe I'm saying that at all. I'm saying that a person wants to exercise——

Mr. KOPETSKI. Well, let's suppose somebody knows how—doesn't speak English. And because they don't and because they feel that, well, look, I shouldn't go vote because I'm not sure who these people are; I don't know this ballot measure because I haven't chosen to learn the English language. So now they haven't gone to vote. So now they're not exercising their citizenship, the responsibility as citizens; is that right?

Mr. TRYFIATES. As I understand what you're saying, if a person comes to this country and refuses to——

Mr. KOPETSKI. No, don't talk about people coming to this country. There are a lot of people born in this country that don't speak English and they're raised not speaking English. Get out there and learn what America's all about.

Mr. TRYFIATES. Well, I believe that I have learned a good deal of what America is about.

Mr. KOPETSKI. Yes, the English-speaking part of it.

Mr. TRYFIATES. I think that a person who comes to this country, if I may, recognizes they've come voluntarily—even the person who doesn't speak English who was born here, his parents have probably come and recognized that they're in an English-speaking country. I think the emphasis——

Mr. KOPETSKI. What do you mean?

Mr. TRYFIATES. I think the emphasis needs——

Mr. KOPETSKI. No, no, let's go back to voting and being a good citizen, because that's what the purpose of this legislation is all about, is good citizenship; right?

Mr. TRYFIATES. I think the purpose of this legislation supposedly is to ensure that people exercise the right to vote and that they have access to the ballot.

Mr. KOPETSKI. Isn't that being a good citizen?

Mr. TRYFIATES. I believe that the legislation does not do that. It does not address the real issue, and the real issue is that immutability characteristic.

Mr. KOPETSKI. You know, we'd get a lot further in this hearing if you'd answer the question. So let's start over. Is it being a good citizen to vote?

Mr. TRYFIATES. It is being a good citizen to vote.

Mr. KOPETSKI. And if you don't understand the English language, do you think you should vote?

Mr. TRYFIATES. I think that a person should make every effort to vote.

Mr. KOPETSKI. And if you don't understand the English language, should you vote?

Mr. TRYFIATES. You should learn to speak English and cast your vote.

Mr. KOPETSKI. That's not answering the question. Don't be——

Mr. TRYFIATES. That is answering the question. That's as far as I can go, Congressman. I apologize if what I'm saying doesn't——

Mr. **Kopetski.** Doesn't make sense.

Mr. **Tryfiates.** It does make sense. A person, in order to cast his ballot, needs to know——

Mr. **Kopetski.** Well, you're afraid to say some things, aren't you?

Mr. **Tryfiates.** I'm not afraid to say anything at all. I think that——

Mr. **Kopetski.** Yes, you are. You won't answer the question about whether you're a good citizen, a good citizen——

Mr. **Tryfiates.** I have answered that question.

Mr. **Kopetski.** No, you haven't.

Mr. **Tryfiates.** I have said that a person who can't—that a person——

Mr. **Kopetski.** If they don't know how—OK, answer this question yes or no, please: If you can't speak English, should you vote?

Mr. **Tryfiates.** You should still vote.

Mr. **Kopetski.** You should still vote?

Mr. **Tryfiates.** You should make sure that you're——

Mr. **Kopetski.** We're making—that's progress; let me tell you.

[Laughter.]

Mr. **Tryfiates.** Well, Congressman, if I may, I think we've gone around in circles, but I've said it before, that I think you should vote but you should be informed in your voting.

Mr. **Kopetski.** Even if you don't speak English, you should vote; we just established that.

Mr. **Tryfiates.** Yes, you should have a translator. You should make sure that you're voting an informed vote.

Mr. **Kopetski.** Oh, you should have a translator?

[Laughter.]

Mr. **Tryfiates.** Yourself—an individual can provide his own translation. The question with this, with section 203, is, is the Government going to provide that translator? And I have a real question as to whether or not Government translations are accurate. Even the Justice Department has testified that Government translators are——

Mr. **Kopetski.** I'm not interested in the Justice Department right now. But let me ask you this: Now suppose we got somebody that doesn't vote because they're embarrassed and feel that they can't provide as good a job in exercising an informed decision, because they don't speak English. Now do you respect that person?

Mr. **Tryfiates.** Certainly.

Mr. **Kopetski.** Do you think they are a good citizen for not voting?

Mr. **Tryfiates.** I think that they've got a challenge before them. They have—they want to exercise the right to vote and they recognize that they need to do it intelligently, and they recognize that they need to learn to speak the English language. We've discussed earlier in this hearing really that the question——

Mr. **Kopetski.** Well, let me ask you another question.

Mr. **Tryfiates.** Well, if I may finish——

Mr. **Kopetski.** Yes.

Mr. **Tryfiates** [continuing]. We discussed earlier in this hearing that education is part of the problem and that bilingual ballots aren't really providing the answer to that problem.

Mr. **Kopetski.** Well, see——

Mr. TRYFIATES. If I may, if the real issue is education——

Mr. KOPETSKI. The problem is——

Mr. TRYFIATES [continuing]. Then we need to emphasize education.

Mr. KOPETSKI [continuing]. That education is wonderful, but it's stressed and it's not an entitlement. There's no entitlement to the right to speak, to learn English in the United States. So there are some problems there.

But now let me—I'm curious about one other kind of person in our society, and that's the misinformed drug dealer who pedals drugs in our Nation's neighborhoods and school yards, and that person goes and votes and they speak English. Now do you think that person is a better citizen because they are voting, because they vote? Do you think they're a good——

Mr. TRYFIATES. I think voting is an important part of the political process.

Mr. KOPETSKI. Even for the drug dealer?

Mr. TRYFIATES. Even a drug dealer should vote. I mean any citizen should vote.

Mr. KOPETSKI. Even the English-speaking drug dealer?

Mr. TRYFIATES. Of course. I mean, anyone who has the right to vote should exercise their right to vote. Whether or not a person is a good citizen, I don't see where that comes in with respect to bilingual ballots. If we're going to grade every citizen and his personal morality as he's going to cast his ballot, I really question whether or not that has anything to do with section 203——

Mr. KOPETSKI. But you want to grade them on the fact of whether they speak English or not.

Mr. TRYFIATES. Well, I think that our point has been very well made in the sense that a person, in order to exercise his vote, needs to learn to speak the English language. It's not you or I that is saying that; it's the person himself who recognizes the need to do that.

What we're doing, instead of helping the person to learn to speak English, is we're providing that person a bilingual ballot.

Mr. KOPETSKI. Yes, but, you see, the problem is——

Mr. TRYFIATES. That's not helping him learn to speak English.

Mr. KOPETSKI. See, I have a lot of folks in my district that speak different languages—Russian and Spanish and all kinds of things. It's a wonderful district. And I guess I'm having a problem with this concept where it's OK if the drug dealer goes to the polls and votes against the police levy and gets to do that because he understands what he's voting on on the ballot, because he understands the ballot, but the responsible citizen who wants to pass the police levy and get the drug dealers out of the neighborhood, they don't get to vote because they don't understand what's on the ballot, and there's something seriously wrong with our country and with that situation.

Mr. TRYFIATES. That person does get to vote.

Mr. KOPETSKI. So that's why I support this bill.

Thank you very much, Mr. Chairman.

Mr. EDWARDS. Well, this panel has been very stimulating and very helpful.

[Laughter.]

Mr. EDWARDS. And we thank you very much. We do have two other panels, so we're going to have to move along. So thank you.

Faith Roessel is director of the Washington office of the Navajo Nation, which is the largest tribe in the United States in terms of both land and population. Ms. Roessel has practiced law, Indian law, for 10 years.

Ms. Roessel, you are welcome and you may proceed. Without objection, all of the full statements of all members of this panel will be made a part of the record.

STATEMENT OF FAITH ROESSEL, DIRECTOR, NAVAJO NATION WASHINGTON OFFICE

Ms. ROESSEL. Mr. Chairman, thank you for the opportunity to testify here before this committee. Before I begin, I would like to make you aware that we have an entire Navajo tribal delegation here in the audience. These are members of the Government Services Committee of the Navajo Nation Council. I think it is really a tribute to them because they are here to study the federalist system, to look at the Congress and how it operates, and I think they really have gotten a stimulating view this morning.

But——

Mr. EDWARDS. Well, we're stimulating, anyway, aren't we?

[Laughter.]

Ms. ROESSEL. I don't think we would agree with some statements being made.

Mr. EDWARDS. We welcome all the members of the great Navajo Nation.

Ms. ROESSEL. Thank you.

I am the director of the Navajo Nation Washington Office, and the Navajo Nation has a separate office because they believe that this is one way that we can more closely liaison on the issues of importance to the nation, one of which is the right to vote, and I think that I would like to sort of refocus on everybody's attention that we are talking about the constitutional right to vote. I am not here, by no means, to defend a way of life or to defend the Navajo culture or language, because it is who we are and we will not back down from who we are.

The Navajo Nation is composed of over 200,000 Navajo members and we stretch into three States: Arizona, New Mexico, and Utah. In those three States, there are at least seven counties that also dissect through the Navajo Nation itself. We believe that the opportunities afforded under the Voting Rights Act should be extended, language assistance in particular. For us it is important because ours is a language that is oral, and we do not have really a written language. We do, but most of the members are not literate in that language for its being written. Therefore, oral assistance to exercise our right to vote is absolutely essential.

What I would like to emphasize with you this morning is that we have a very vibrant and very exciting language that really projects our way of life. This is something that we use on a daily basis. The members of the Government Services Committee conduct their business in that language. They had a meeting yesterday in our offices and did so, and the Navajo Nation Council also conducts its business in the Navajo language. So this is something that we—it's part of our way of life.

An example of this, and continuation of how important the language is, the Navajo Nation Council a few years ago passed a resolution that emphasized the importance of teaching Navajo language, history, and culture to Navajo students. So it is a very important policy for the Navajo Nation to continue the use of our language.

According to the Navajo election office, approximately 40 percent of our voters require some kind of language assistance. Currently, the Navajo Nation is covered under section 203 itself, and those are in the counties of McKinley, San Juan, and Socorro in New Mexico and San Juan in Utah. In the counties in Arizona, we are covered either by section 4(f)(4), another bilingual provision under the Voting Rights Act, or section 203, or consent decrees.

I would like to point out that four out of the five lawsuits brought by the Justice Department, the U.S. Justice Department, were all lawsuits brought on the Navajo Nation against counties on our land. The consent decree method that has been used by the Justice Department has certainly given us opportunities we may not have had, but I would like to say that the consent decrees are only for a time certain. They really set up an adversarial relationship with the Navajo Nation and the local counties and the State, and we would very much prefer to have continuation of coverage under section 203.

I would like to emphasize to you also that in terms of coverage on the Navajo Nation, Navajo voters in Bernalillo and Sandoval Counties are not covered by 203. In Sandoval County, however, we do get language assistance by a consent decree that will be expiring in a couple of years.

Ramah community, one of our satellite communities, is not covered by any language assistance provision. So the community members there who are very traditional and do need this assistance do not get this at all.

I would like to just give a final few words about the success of section 203, and I think the committee really needs to hear that this is something that Congress has intended to work, and it is working for us.

When you look at the number of registered Navajo voters, the Navajo voter turnout, precincts with predominantly Navajo voters and elected Navajo officials, all of these have increased since 1976. In Apache County, for example, Navajo officials—excuse me, registered voters in the precincts with majority Navajos have doubled from 1972 to 1990. In San Juan County, UT, voter turnout has more than doubled since enactment of the Voting Rights Act.

Increases in voter registration and turnout also have had a tremendous impact in who we have been able to elect to county and State offices, and the bottom line is we have been able to elect Navajo people to those positions. For example, since 1972, 14 Navajo State legislators have been elected to office in various counties in all of the three States. Eighteen county seats—and these would include county commissioners, county boards of supervisors, and a sheriff—have all been filled by Navajos in those various counties.

As we've learned today, it's a fundamental attribute to have participation in our democratic process, and I think when we're looking at trying to be more participatory and be less divisive, section 203 has had a tremendous impact in making sure that Navajo people can have an informed vote and they can elect people that will make the process not be alienating to them, but make them feel like they are actually participating.

I would like to just close very quickly with the last comment that we very much support an alternative standard for American Indians. As Ms. Wolfley explained to the committee earlier, what has happened is we have counties, several counties, like for the Navajo Nation, that divide our population base. And if we were able to have the Indian Navajo Reservation as the contiguous entity, we would be able to meet even greater the needs for language assistance to Navajo voters.

And, in final, I would just like to remind the committee that, had it not been for the Navajo Nation's use of its language, we probably would have not won World War II in the Pacific. In World War II, it was the Navajo Marines, a group of young Navajos, who because of their usage of their own language, which was of course their mother tongue, were very instrumental and are called the "Navajo Code-Talkers." It was because of them that the Japanese were never able to break that code, and we have that contribution.

Mr. EDWARDS. Well, that's a very, very interesting statistic, isn't it?

[The prepared statement of Ms. Roessel follows:]

STATEMENT OF THE NAVAJO NATION
PRESENTED BY FAITH ROESSEL, DIRECTOR OF
NAVAJO NATION WASHINGTON OFFICE
BEFORE THE
HOUSE JUDICIARY SUBCOMMITTEE
ON CIVIL AND CONSTITUTIONAL RIGHTS
ON
H.R.4312, THE VOTING RIGHTS ACT AMENDMENT

Mr. Chairman, members of the Subcommittee, I am Faith Roessel, Director of the Navajo Nation Washington Office. On behalf of the Navajo Nation, I am grateful for this opportunity to present the Navajo Nation's views on reauthorization of Section 203 of the Voting Rights Act. President Peterson Zah and Vice-President Marshall Plummer represent over 200,000 Navajo residents. Many would greatly benefit from H.R.4312 sponsored by Congressman Jose Serrano of New York. I especially thank the co-sponsors of this important bill.

Section 203 of the Voting Rights Act, provides language assistance to minority language groups. This will expire in August 1992. The Voting Rights Act, a very important piece of legislation to the Navajo Nation, has proven to be successful since its enactment. The provision of language assistance during elections has increased the number of 1) registered Navajo voters, 2) voter turnout, 3) precincts with large Navajo voters and 4) elected

Navajo individuals to State and County seats. This is largely due to the language assistance provided by the counties. I cannot overemphasize the continuing need for language assistance as provided by Section 203.

Background:

The Navajo Reservation overlaps into the States of Arizona, New Mexico and Utah covering 26,000 square-miles, approximately the size of West Virginia. There are three satellite communities, Alamo, Canoncito and Ramah (see map). All are located in New Mexico separate from the main Reservation.

The Voting Rights Act, as amended in 1975, provides language assistance to ensure that all citizens are afforded an opportunity to exercise their right to vote. In the case of most American Indian languages, only oral assistance and publicity are provided due to the fact that Indian languages are largely unwritten.

The 1982 amendment of Section 203 changed the formula used to identify the jurisdictions covered, thus eliminating three-quarters of the counties previously required to provide language assistance in American Indian languages. As a result, 56 of 70 counties or 80% that were previously required to provide language assistance no longer were required to provide it. The 1982 amendment further restricted coverage by imposing a five percent limited-English proficiency threshold.

The 1982 amendment had a great adverse impact on American Indian voters. In New Mexico, two counties, one of which provided language assistance to American Indians, were no longer required to provide this significant assistance. In other states, six out of eight counties in South Dakota, four out of five counties in North Dakota, 24 out of 25 counties in Oklahoma, and six out of seven counties in Montana that were originally providing assistance in Indian languages were no longer required by federal law to do so.

The current approach of using counties as the operative jurisdiction for coverage divides and diminishes the already diminutive American Indian voter populations. Many Indian language speakers residing on reservations like the Navajo Reservation are divided between two or more counties, thereby distributing concentrations of American Indian voter populations among these counties. The fragmented Indian populace are then lumped together with the remaining non-Indian areas of counties and as a result almost inevitably fail to constitute 5% of the jurisdiction's population.

In New Mexico, Navajos living on the Navajo Reservation or on trust or fee lands extend into other counties not covered by Section 203. The determination for coverage under the current law does not include Bernalillo and Sandoval Counties where various precincts have predominately Navajo voters. The Ramah community, situated in Cibola County, does not receive any assistance, whatsoever.

This occurs in other parts of Indian Country. The Cheyenne River Reservation in South Dakota is divided into two counties where the tribe meets the 5% threshold in one county and not in the other, thus receiving language assistance in only one county.

If Section 203 is not reauthorized, counties on the Navajo lands in New Mexico and Utah will no longer be required to provide language assistance resulting in less participation of Navajo voters.

Navajo Language:

The Navajo people are a strong traditional, dynamic and creative people. The Navajo language is fundamental to our outlook on life. Our philosophy revolves around and begins with our language. Our language is widely used. We are teaching it to our young people. We are teaching it in our schools.

The importance of our language is best exemplified by a Navajo Nation Council resolution (CN-61-84) adopting the Navajo Education Policy. The Navajo Nation Council endorsed as its mission to provide an appropriate education for Navajo people that fosters "competence in Navajo language skills and knowledge of Navajo culture." Subsection 111 and 112 of the Education Policy emphasizes the importance of Navajo language and culture in education:

Subsection 111:

"The Navajo language is an essential element of the life, culture and identity of the Navajo people. The Navajo Nation recognizes the importance of preserving and perpetuating that language to the survival of the Nation. Instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation. Navajo language instruction shall include to the greatest extent practicable: thinking, speaking, comprehension, reading and writing skills and study of the formal grammar of the language."

Subsection 112:

"The survival of the Navajo Nation as a unique group of people growing and developing socially, educationally, economically and politically within the larger American Nation requires that the Navajo People and those who reside with the Navajo People retain and/or develop an understanding, knowledge and respect for Navajo culture, history, civics and social studies. Courses or course content which develops knowledge, understanding and respect for Navajo culture, history, civics and social studies shall be included in the curriculum of every school serving the Navajo Nation. The local school governing board, in consultation with parents, students and the local community, shall determine the appropriate course content for the Navajo culture component of the curriculum."

The 1988 FAX book developed by the Navajo Nation indicates that five percent of the Navajo population are age 65 years and older. Eleven percent are 45-64 years of age and 9.5 percent are 35-44 years of age. Thirty seven percent of those 25 years of age and older completed less than 5 years of school. Navajos in these age categories are less English proficient. According to the Navajo Election Office, approximately 40% of Navajo voters require some form of language assistance.

Coverage of Section 203 on the Navajo Nation:

Apache, Coconino and Navajo counties in Arizona are covered by both Section 203 and 4(f)(4), a separate bilingual provision. Two counties, Navajo and Apache, are covered by consent decrees. In New Mexico, McKinley, San Juan, and Socorro counties are covered by Section 203 and two counties, Sandoval and McKinley are covered by consent decrees. In Utah, San Juan county is covered by Section 203 only.

Section 203

Because the Arizona counties are covered either by Section 4(f)(4), Section 203 or consent decrees, this leaves only four counties mandated by Section 203 to provide language assistance to Navajo voters. These counties are McKinley, San Juan and Socorro in New Mexico and San Juan in Utah. A table below lists the total number of precincts per county and of that the number of Navajo precincts.

County	Total Precincts	Total Precincts on Reservation with Large Number of Navajo Voters
McKinley (NM)	49	25
San Juan (NM)	70	14
Socorro (NM)	17	1
San Juan (UT)	20	7

(Source: Counties listed above)

Section 203 and 4(f)(4)

In Arizona, counties with large Navajo voters are covered by both Section 203 and 4(f)(4) providing language asistance. A table below shows the total number of precincts per county and of that the number of precincts with a large number of Navajo voters.

County	Total Precincts	Total Precincts on Reservation with Large Number of Navajo Voters
Apache (AZ)	44	32
Coconino (AZ)	65	19
Navajo (AZ)	49	16

(Source: Counties listed above)

Consent Decrees

The U.S. Department of Justice through its responsiblity to ensure compliance with the provisions of the Act was successful to obtain consent decrees to provide language assistance in some counties in New Mexico and Arizona. In New Mexico, the State of New Mexico consented to implement a Native American Election Information Program to assist American Indian voters in Sandoval County. Since Sandoval County is not covered by Section 203, Navajo voters are ensured language assistance through this consent decree. In McKinley County, Navajo voters are covered by both Section 203 and a similar consent decree as in Sandoval County. These decrees will eventually expire. The consent decree in Sandoval County will expire in 1992 and in Mckinley County, 1995.

Similar consent decrees are also in effect in Apache and Navajo counties in Arizona. The Navajo Nation cannot solely rely on the consent decrees to continue providing language assistance. Litigation is costly and it also divides the Navajo Nation and the local county and state governments. We would much prefer adequate coverage of Section 203 over counties with non-English proficient Navajos rather than continually suing to enforce our right to vote.

Inadequate or No Coverage

Navajo voters in Bernalillo and Sandoval counties are not covered by Section 203. Ramah, one of the satellite Navajo communities is not covered by any language assistance provision. The Navajo Nation requests that these Navajo communities become included under Section 203.

Success of Section 203:

Section 203 and other mandated language assistance provisions have been successful on Navajoland. The number of registered Navajo voters, Navajo voter turnout, precincts with predominately Navajo voters and elected Navajo officials has increased since 1976. In Apache County, Arizona, registered voters in precincts with majority Navajos has increased from 9,706 in 1972 to 18,355 in 1990. In McKinley County New Mexico, voter turnout increased from 5,049 in 1972 to 7,015 in 1990. In San Juan County, Utah, voter turnout has more than doubled since enactment of the Voting Rights Act and provision of language assistance. Voter registration and voter turnout by counties is shown in the table below:

County	Registered Voters		Voter Turnout	
	1972	1990	1972	1990
Apache (AZ)	9,706 (10 prec)	18,355 (32 prec)	5,175 (10 prec)	9,706 (32 prec)
Coconino (AZ)	3,509 (5 prec)	9,266 (19 prec)	2,325 (5 prec)	5,117 (19 prec)
Navajo (AZ)	4,308 (9 prec)	8,061 (16 prec)	-----	-----
McKinley (NM)	-----	5,049 (25 prec)	11,249 (16 prec)	7,015 (25 prec)
San Juan (NM)	5,000 (1976 - 10 prec)	7,887 (14 prec)	3,959 (1976 - 10 prec)	4,876 (14 prec)
Socorro (NM)	246 (1976)	396	207 (1976)	304
San Juan (UT)	1,319 (6 prec)	3,452 (7 prec)	768 (6 prec)	2,038 (7 prec)

(Source: Counties listed above)

Increases in voter registration and voter turnout also have a tremendous impact on the number of elected Navajos to county and state government. Since 1972, 14 Navajo state legislators (four Senators and ten Representatives) have been elected to office in various counties in all three states. Eighteen county seats including County Commissioners, County Board of Supervisors and a Sheriff have been filled with Navajos in various counties in all three states. The Navajo Nation believes that by electing Navajos to office we have a better opportunity to have our views presented to traditionally non-Navajo institutions. It also ensures that we are properly represented.

Reauthorization and Amendment of Section 203:

The Navajo Nation urges Congress to reauthorize Section 203 of the Voting Rights Act for fifteen years until 2007 and to improve coverage of Indian language speakers.

Reauthorization

The Navajo Nation will be harmed if Section 203 of the Voting Rights Act is left to expire in August 1992. If Section 203 is not reauthorized, counties located on the Navajo Reservation in New Mexico and Utah will no longer be required by federal law to assist Indian language speakers. Many Navajo voters may not have an opportunity to effectively participate in county, state and national elections. As a result, many Navajo voters will be denied their inherent right to vote simply because they are unable to understand the ballots or registration materials. In addition, the U.S. Department of Justice will no longer be responsible for prosecuting state and county violations pursuant to Section 203.

The Navajo Nation cannot simply rely on litigation and possible consent decrees. The current decrees are soon to expire, thereby necessitating a need for Section 203 to be reauthorized.

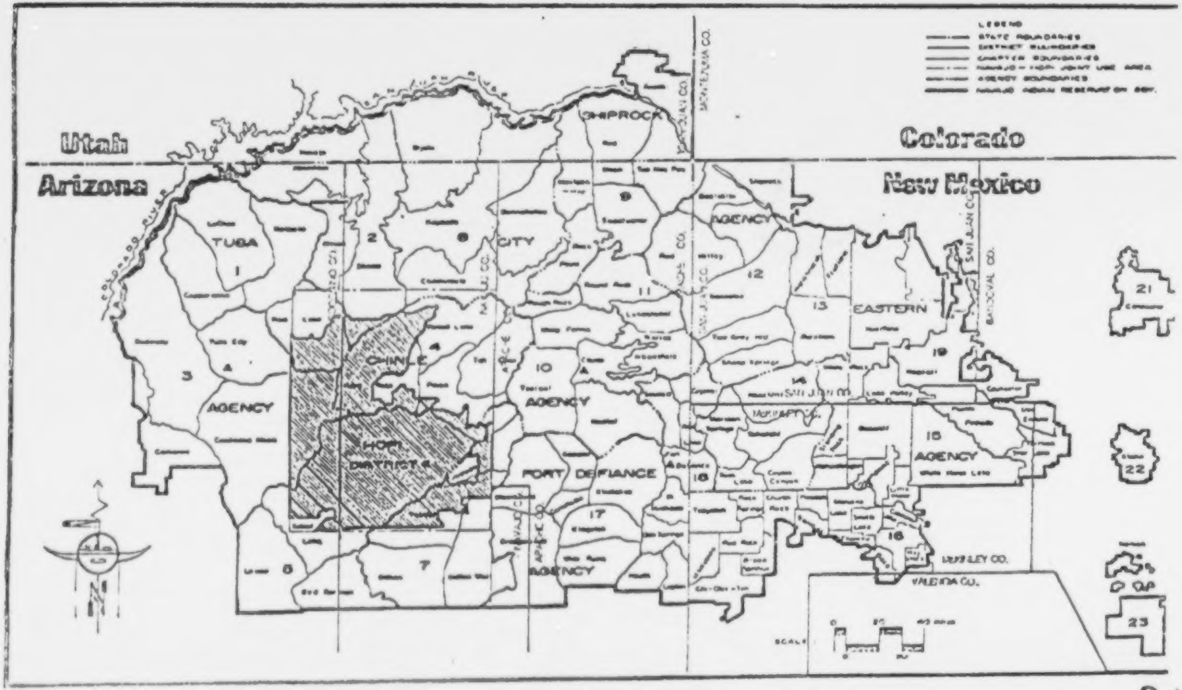
Alternative Standard of Comparison for American Indians

The current formula under Section 203 requires the Census Bureau to determine coverage by comparing the total voting population of a state or county with the voting population of Indian language speakers with limited-English proficiency. Under this law, the number of Indian-speaking people over 18 years of age must exceed five percent of the total voting age population in a county or parish. This current coverage formula does not effectively identify American Indian language speakers needing assistance.

Under the current law, Navajo voters in Sandoval County are not covered due to the growth of Rio Rancho, a southeastern metropolitan part of the county. Canoncito, a satellite community of the Navajo Nation, under Bernalillo County is also not covered for language assistance due to the community's proximity to Albuquerque, a large metropolitan city. Ramah, another satellite community with Navajo voters, is not covered at all.

We believe Navajo voters in both San Juan County, New Mexico and San Juan County, Utah will no longer be covered because of the growth of non-Indians in bordering towns. In New Mexico, if H.R.4312 were enacted, possibly five precincts with large numbers of Navajo voters in Cibola, Bernalillo and Sandoval counties would be covered plus McKinley, San Juan and Socorro counties.

The Navajo Nation supports an alternative to the current formula provided by H.R.4312 because it will better meet the needs of Navajo and other Indian language speakers. We believe that the current coverage formula excludes many Navajo-speaking people and for that reason it should not only be reauthorized, but amended to better identify our people who could benefit from this much needed assistance.


LEGEND
STATE BOUNDARIES
DISTRICT BOUNDARIES
CHAPTER BOUNDARIES
NAVAJO-HOPI JOINT USE AREA
AGENCY BOUNDARIES
NAVAJO INDIAN RESERVATION BDY.
Utah
Arizona
Colorado
New Mexico
COLORADO RIVER
SHIPROCK
MONTEZUMA CO.
SAN JUAN CO.
AGENCY
TUBA
CITY
CHINLE
AGENCY
HOPI
DISTRICT 6
FORT DEFIANCE
AGENCY
EASTERN
AGENCY
SAN JUAN CO.
SANDOVAL CO.
McKINLEY CO.
VALENCIA CO.
NAVAJO CO.
APACHE CO.
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
21
22
23
SCALE

Mr. EDWARDS. Margaret Fung is executive director of the Asian American Legal Defense and Education Fund in New York City. We welcome you and you may proceed.

STATEMENT OF MARGARET FUNG, EXECUTIVE DIRECTOR, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

Ms. FUNG. Good morning. Thanks very much for inviting me to testify today.

For the past decade, voting rights have been one of AALDEF's major concerns because historically Asian-Americans have been excluded from full participation in the political process. A host of laws that have restricted Asian immigration, prevented Asians from testifying in courts, and rendered Asians ineligible for citizenship have had a decidedly chilling effect on their involvement in the political process. We have tried to work on this issue in a number of ways—by challenging redistricting schemes which have split Asian-American communities, by negotiating voluntary arrangements with the New York City Board of Elections for the hiring of bilingual interpreters and the provision of translated materials, as well as conducting exit poll surveys of non-English-speaking Asian-American voters.

But, as a result of a decade of work in this area, we are convinced that section 203 of the Voting Rights Act has been effective in providing language minorities with greater access to the political process, and we hope that it will be reauthorized for 15 years.

Voter registration and participation has increased among language minority citizens as a result of section 203, and the number of elected officials representing language minority groups has increased as well. However, we would also urge the adoption of a numerical benchmark of 10,000 as an alternative method of triggering coverage under section 203. This would ensure that non-English-speaking Asian-American communities in large metropolitan areas, like New York City, San Francisco, and Los Angeles, which fail to comprise 5 percent of the voting-age population of their counties, would receive language assistance under this provision.

In New York City we work very closely with members of the Latino community, and we've seen the importance of Spanish language ballots and voting assistance, and how it has enabled Latino New Yorkers to mobilize and gain access to political power.

Asian-Americans, too, are growing in significant numbers in New York City, numbering over half a million. Numerous issues have galvanized our interest in political action, whether it's the rising number of incidents of anti-Asian violence, Japan-bashing, the boycotts of Korean-owned stores throughout the city. Yet, despite this interest and need and the understanding for the need for political advocacy, voter registration efforts among Asian-Americans have been stymied, primarily because of language barriers, and voter turnout remains low. Section 203 was enacted precisely to eliminate such barriers.

I'd like to highlight from my testimony our experience in New York City. The voting age population is indicated to be around 395,000, but despite the growing number of Asian-Americans who have registered to vote, it's estimated, according to the New York City Districting Commission, which just redrew city council lines in

New York City, that there are between 7,000 to 9,000 Chinese-speaking voters in Chinatown.

Similar studies done of Asian-American voters in Los Angeles and San Francisco also indicate very low levels of voter registration. In Los Angeles, for example, although the average is 60 percent among individuals, the rate for Japanese-Americans is 43 percent; for Chinese-Americans, 35 percent; for Korean-Americans, 13 percent. Similarly, in San Francisco, although there is a 70-percent voter registration rate for non-Chinese citizens, only 31 percent of the Chinese-Americans are registered.

Asian-Americans are also underrepresented among elected officials. While California has two Asian-American Representatives serving in the U.S. Congress, there are no Asian-Americans in the California State Legislature. Asian-Americans constitute 30 percent of San Francisco's population. Yet, there is only one Asian-American serving on its 11-member board of supervisors.

And in New York City, where Asian-Americans number over half a million, no Asian-American has ever been elected to the State assembly, the State senate, or the New York city council. In fact, it was only as recently as 1988 that three Asian-Americans won an election, and that was as civil court judges.

We believe that amending section 203 to include a 10,000 benchmark would extend needed language assistance to a number of Asian-Americans throughout the Nation. In New York City we believe this would have an impact on approximately 63,000 Chinese-Americans and an additional 10,000 Korean-American voters. Almost a third of the total Chinese and Korean populations would benefit from this kind of assistance, if a 10,000 benchmark were adopted.

I also want to add that we have done some exit poll surveys of Asian-American voters since 1988. It's the first time, I believe, that it's been done. It was done in the Presidential election and the mayoral primary and various other elections. We have found almost uniformly that one-third of the Chinese and Korean voters believe that they don't speak English well, and four out of five voters have said that they would vote more often if ballots were available in their native languages.

One final point concerning voluntary assistance, which has been advocated by some, voluntary assistance by local jurisdictions: We recently had an election in the New York City Council where there was a redistricting effort expanding the body from 35 seats to 51 seats. There was an attempt to have voluntary assistance provided by the New York City Board of Elections. Unfortunately, there were several allegations of discriminatory treatment and intimidation of China Town voters in this election which were lodged by an Asian-American candidate who was defeated.

The Justice Department did send Federal observers. A hotline was set up, and there was broad publicity about the impact of the lack of effective language assistance provided by the local jurisdiction. We think that the passage of—the reauthorization of section 203, in addition to a numerical benchmark, would clarify those responsibilities of the States and cities, so that they will be providing language assistance to those people who need it.

Thank you very much.

Mr. EDWARDS. Thank you very much, Ms. Fung.
[The prepared statement of Ms. Fung follows:]

STATEMENT OF MARGARET FUNG
EXECUTIVE DIRECTOR
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
HOUSE JUDICIARY COMMITTEE

CONCERNING THE LANGUAGE ASSISTANCE PROVISIONS
OF THE VOTING RIGHTS ACT

April 1, 1992

Good morning. Thank you for inviting me to testify before your Committee today regarding the Voting Rights Act. My name is Margaret Fung, and I am the executive director of the Asian American Legal Defense and Education Fund (AALDEF). AALDEF, founded in 1974, is the only non-profit organization on the East Coast that specifically addresses the legal needs of Asian American communities through impact litigation, community education and law student internship training.

AALDEF is also a part of the National Asian Pacific American Legal Consortium, which was established last year in cooperation with the Asian Law Caucus in San Francisco and the Asian Pacific American Legal Center of Southern California in Los Angeles. The National Consortium addresses issues of anti-Asian violence and voting rights for Asian and Pacific Islander communities in the United States.

For the past decade, voting rights has been one of AALDEF's major concerns because historically Asian Americans have been excluded from full participation in the political process. The host of laws that have restricted Asian immigration, prevented Asians from testifying in courts, and rendered Asians ineligible for citizenship have had a decidedly chilling effect on their involvement in the political process. AALDEF has sought to enhance the possibility of change by engaging in the following activities:

1982 AALDEF led community opposition to a redistricting plan that split New York's Chinatown between two state assembly districts, thereby diluting minority voting strength.

1985 AALDEF helped to incorporate and secure tax-exemption for the Chinatown Voter Education Alliance (CVEA), a broad-based nonpartisan coalition of 30 Asian American community groups engaged in voter education and registration. AALDEF, together with CVEA, negotiated for the first time an agreement with the New York City Board of Elections to hire Chinese-language interpreters at five polling sites in Chinatown and to permit translated sample ballots to be posted in these polling sites.

1988 AALDEF conducted the first exit poll surveys of Asian American voters in Manhattan's Chinatown and in Flushing, Queens.

1989 AALDEF organized a coalition of Asian American groups which urged the New York City Charter Revision Commission to create more City Council districts that would enhance the likelihood of Asian American representation in the City's governing body.

1990-91 AALDEF testified before the New York City Districting Commission in support of a multiracial Chinatown-Lower East Side district in Lower Manhattan that would consolidate the voting strength of Asian Americans and enable them to work in coalition with Latino voters to elect a minority candidate of their choice.

1992 AALDEF, together with the Asian American Bar Association of New York, submitted proposed district lines for the New York State Assembly and State Senate, designed to avoid the fragmentation of Asian American communities throughout New York City.

These experiences are what motivate us to support the reauthorization of Section 203 of the Voting Rights Act. The bilingual voter assistance provisions have been effective in providing language minorities with greater access to the political process. Voter registration and participation has increased among language minority citizens as a result of Section 203, and the number of elected officials representing language minority groups has increased in the past seventeen years.

However, we also urge the adoption of a numerical benchmark of 10,000 as an alternative method of triggering coverage under Section 203. This will ensure that non-English-speaking Asian American communities in large metropolitan areas such as New York City, Los Angeles, and San Francisco, which fail to comprise 5% of the voting age population, receive language assistance under Section 203.

In New York City, we work closely with members of the Latino community on common issues of concern--redistricting, immigrant rights, bilingual education, affordable housing, police abuse--and we have seen how effectively Latino New Yorkers have mobilized to gain access to political power. Their voices are heard by governmental agencies; the ranks of Latino elected officials have increased, and the needs of the Latino community are being addressed in a serious way. Spanish-language ballots and voting assistance have been available in New York City for and voting assistance have been available in New York City for several years, and Latinos now form an important voting bloc in New York City that is being heard.

Asian Americans, too, are growing in significant numbers in New York City, having doubled in the past decade to over half a million. But this population growth has not been accompanied by a commensurate increase in political power. Numerous issues have galvanized the Asian American community into political action--protests against a rising number of incidents of anti-Asian violence, Japan-bashing, boycotts of Korean-owned stores throughout the City, the non-payment of wages to Asian restaurant and garment workers, discrimination in the workplace against immigrants and undocumented aliens. These and many other problems of continuing discrimination are well documented in the U.S. Commission on Civil Rights Report, "Civil Rights Issues Facing Asian Americans in the 1990's," just released last month. Despite a growing understanding of the need for political advocacy and involvement in the electoral process, voter registration efforts have been stymied, primarily because of language barriers, and voter turnout remains low.

Section 203 was enacted precisely to eliminate these barriers for language minorities who do not speak or understand English adequately enough to participate in the electoral process. This provision is triggered whenever 5% of the voting age citizens in a political subdivision are members of a single language minority, and when the illiteracy rate of this group is term "language minority" specifically includes Asian Americans, together with Hispanic Americans, Native Americans and Alaskan Natives.

Yet, as a practical matter, no Asian American community in the mainland United States has received the benefits of Section 203, since they are submerged within much larger county populations and have not met the 5% threshhold. (Only three counties in Hawaii were designated by the Director of the Census for coverage under Section 203 and are mandated to provide Japanese-language assistance. 49 Fed. Reg. 25887-88, June 25, 1984.)

My remarks will highlight our experience with New York City's Asian American communities. It has the largest concentration of Asian Americans in the nation, yet not a single Asian American has ever been elected to the State Legislature or the City Council. Our recent exit poll surveys indicate that Chinese- and Korean-language assistance would have a substantial impact in lifting barriers to the fundamental right to vote for thousands of Asian American citizens. I will expand on these survey results later in my remarks.

The Emerging Asian American Population

According to the 1990 Census, over 7.3 million Asian Americans live in the United States--a 400% increase over the past two decades. Much of this population growth results from the elimination of discriminatory immigration quotas in 1965.

As a result, over 60% of the nation's Asian American population is foreign born and with only limited English proficiency.

In New York City, there are 512,719 Asian Americans, constituting 6.7% of the City's total population. The highest concentrations are in Queens County (11.8%) and Manhattan (7.2%). It is estimated that by the year 2000, there will be more than 700,000 Asian Americans in New York City's metropolitan area. (Community Service Society, "The Linguistic Minorities of New York City," at 21 (1991)).

According to the 1990 Census, the total Asian American voting age population in New York City is 394,657 (Bronx 25,706; Kings 83,658; Manhattan 92,071; Queens, 181,307; Staten Island 11,915). However, the number of registered Asian American voters, though increasing steadily over the years, has remained small. Based on data generated by the New York City Districting Commission in its task of drawing new City Council district lines in 1991, it is estimated that the number of Asian American registered voters in New York City's Chinatown is between 7,000-9,000.

Studies of Asian American voters in Los Angeles and San Francisco also indicate low levels of voter registration. According to the 1986 UCLA Asian Pacific American Voter Registration Study, Asian American voter registration was well below the Los Angeles county average of 60% for individuals over 18: a rate of 43% for Japanese Americans, 35% for Chinese Americans, 27% for Filipino Americans, 13% for Korean Americans,

Americans, 27% for Filipino Americans, 13% for Korean Americans, 17% for Asian Indians and 4.1% for Vietnamese Americans. A similar study found that only 30.9% of Chinese Americans in San Francisco were registered to vote, as compared to the 69.1% voter registration rate for non-Chinese citizens. (G. Din, An Analysis of Asian/Pacific American Registration and Voting Patterns in San Francisco, Nov. 29, 1984)

Asian Americans are also underrepresented among elected officials. In California, which has the nation's largest Asian American population, the San Jose Mercury (April 1, 1991) reports that Asians comprise only 46 out of 2,861 elected officials statewide. While California has two Asian American representatives serving in the U.S. Congress, there are no Asian Americans in the California state legislature. Asian Americans constitute 30% of San Francisco's population, but there is only one Asian American serving on the 11-member Board of Supervisors. And in New York, where Asian Americans number over half a million, no Asian American has ever been elected to the State Assembly, the State Senate or the City Council. In fact, it was only as recently as 1988 that three Asian American candidates won countywide judicial elections.

The Need to Provide Language Assistance for Asian Americans

Asian American voter registration and participation remain extraordinarily low, and this is not simply because of the large proportion of immigrants in our community. Even among Asian greater political involvement:

•Redistricting plans have often fragmented Asian communities and diluted their minority voting strength. Only in recent years have Asian American advocates participated actively in the redistricting process, and the impact of their participation remains to be seen.

•Even when redistricting plans have not divided Asian American communities, Asian American populations generally are not sufficiently concentrated to create "majority minority" districts for Asian Americans. For example, the New York City Council, which was expanded from 35 to 51 seats following a federal court mandate, held out the promise for enhanced minority representation. The purported "Chinatown" district that was created in Lower Manhattan, numbering 137,930 residents, had a voting age population that was 41% white, 39% Asian, 15% Hispanic. However, the percentage of registered voters was overwhelmingly white (61%) and had more registered Hispanic voters (15%) than Asian voters (14%). Not surprisingly, all Asian American candidates were defeated.

•Asian Americans are often unfamiliar with the American electoral process, having come from Asian countries with political systems very different from the United States and which may lack a tradition of voting. Special efforts must be made to prepare them for full participation.

•Asian American voters often do not understand basic political procedures: registration by certain dates in order to be eligible to vote in particular elections, the importance of enrolling in a political party in order to vote in primaries, and even how to use voting machines. The Chinatown Voter Education Alliance found that in 1982, 35.2% of Chinatown voters, as compared to 18.9% of voters outside of Chinatown, went to the polls but did not vote--or mistakenly lost their votes through inadvertence--once they were in the voting booths. Many of these defects could be remedied by providing bilingual materials.

•The struggle for day-to-day survival, especially among the working poor in Asian American communities, severely reduces the capacity for involvement in the political process, which often seems removed from their daily lives. It could improve if information about the electoral process were translated and made more accessible.

The addition of a numerical benchmark to Section 203, which was designed to remedy the historical exclusion of language minority groups from participation in the political process, would help to correct some of the problems described above. The provision of federally-mandated language assistance would enable Asian Americans to have the same access to the political process and to vote for the candidates of their choice as other language minorities.

The Impact of Numerical Benchmarks Upon Asian Americans

Amending Section 203 to include a 10,000 benchmark would extend needed language assistance to Asian Americans in approximately 10-15 counties throughout the United States. In New York City, three counties would be covered, with Chinese-language assistance required in New York and Kings County, and Chinese- and Korean-language materials mandated in Queens County. According to estimates prepared for AALDEF by the Community Service Society's Population Studies Unit, a 10,000 benchmark would benefit approximately 63,300 Chinese American and 10,000 Korean American voters with limited English ability in New York City--almost one-third of the total Chinese and Korean populations.

Usage of Bilingual Ballots and Assistance by Asian Americans

AALDEF has conducted exit poll surveys of Asian American voters in New York City since 1988. Exit polls of up to 600 Asian American voters--constituting a sample of 10% of the voter turnout in certain elections--were conducted in the 1988 presidential election, the 1989 mayoral primary, the 1989 general mayoral election, the 1991 City Council primary, and the 1991 City Council general election. We plan to conduct additional surveys in the upcoming presidential election. In the 1991 exit polls, which are representative of other surveys, approximately one-third of Chinese and Korean voters responded that they do not read and understand English well, and four out of five voters stated they would vote more often if ballots were in their native language.

A similar exit poll of 100 Asian Americans in Los Angeles, conducted by the Asian/Pacific American Legal Center in January-February 1992, found that among registered voters, 25.9% would be more likely to vote if bilingual ballots were provided, and 29.6% would be more likely to vote if oral language assistance were provided.

While this issue remains a topic for further study, preliminary data clearly indicates that Asian American voters would use bilingual ballots and would vote more often if language assistance were available.

Cost Issues

The New York City Board of Elections recently reported that the costs of preparing 15,000 Chinese and Korean-language informational brochures for the November 1991 City Council election was $3,294.00 for printing costs, with translation fees amounting to an additional $512.00. In addition, Chinese-language interpreters were hired for the day to staff 6 polling sites in Chinatown. These costs are minimal, given their potential benefits to limited English proficient Asian American voters.

Voluntary vs. Mandatory Language Assistance

One final point merits attention. It has been suggested that language assistance should be provided by local community groups or that other assistance could be done on a limited voluntary basis. Our experience during the September 1991 New York City Council primary elections strongly indicates that such voluntary discretionary procedures are inadequate. Complaints of discriminatory treatment and intimidation of Chinatown voters were lodged by an Asian American candidate who was defeated in the primary. In response to these allegations, the Justice Department sent federal observers to monitor conduct at Chinatown polling sites during the November 1991 general election and set up a telephone hotline to receive complaints. We do not know the result of their actions, because they have not published any report or released any data that would be helpful in evaluating the scope and effectiveness of their intervention. These charges became the basis of a lawsuit brought by the Asian American candidate to set aside the election. In this litigation, currently on appeal to the Appellate Division, the City has taken the position that despite its voluntary provision of bilingual voter assistance for the past several years, it has no duty under federal law to do so. We believe that an expansion of section 203 would clarify that responsibility.

If government takes on the obligation to provide bilingual ballots and voting assistance, then the process would not be subject to the particularities of certain elections, the appearance of partisan influences by candidates and their support groups in providing interpreters and other assistance, or limited only to the occasions when minority candidates are running. The addition of a numerical benchmark under Section 203 would obviate future problems of this nature and serve to clarify the obligations of local jurisdictions throughout the nation.

Conclusion

The Asian American Legal Defense and Education Fund urges the reauthorization of Section 203 and the inclusion of a numerical benchmark of 10,000 that will provide significant populations of citizens with limited English speaking ablity to obtain fair and equal access to the electoral process.

Congress is now presented with the historic opportunity to clarify and reaffirm its commitment to the voting rights of minority groups that have historically been disenfranchised. A democratic electoral process cannot be truly effective if all of its citizens do not participate fully in the system. The politics of inclusion requires that Asian Americans receive the full extent of multilingual assistance currently available to other language minorities under Section 203. We ask that you implement the recommended changes in the Voting Rights Act. Thank you.

Mr. **Edwards**. Josephine Wang is a teacher from Gaithersburg, MD, and is our next witness. We welcome you.

STATEMENT OF JOSEPHINE J. WANG, TEACHER, GAITHERSBURG, MD

Ms. **Wang**. Good morning. Actually, I should say:

[Whereupon, Ms. Wang speaks in Chinese.]

Ms. **Wang**. I guess at this particular point I would require maybe an interpreter if I didn't speak English. What it really says: I am Josephine Wang. I come from China and I'm a naturalized citizen.

Just to give you a little background about myself, I am not a director of an organization. I'm not an elected official. I'm not an expert in surveys. I'm just a regular citizen who had come from China and actually tried to master the English language, so I can mainstream. OK? I don't know if I have done so already, but I'm still trying. So that's my introduction about myself.

OK. I'm really delighted to come here to speak on behalf of myself really and some of the people I've talked to. Section 203 of the Voting Rights Act would appear to be a very expensive endeavor, not to mention the divisive elements that it contains. I'll give you two specific examples to illustrate my point.

First, it is a case of a multilingual newsletter. Just a few years ago, I was teaching a class of high school limited English proficiency students in a school system which services 4,000 LEP students—"LEP" stands for limited English proficiency students—from at least 20 countries. The monthly newsletter written in English and translated in five other languages was to be distributed among students. These languages were Spanish, Chinese, Korean, Vietnamese, and Cambodian. There was also a parent handbook printed in these similar languages.

Now upon passing out these materials in my class, or classes—I did teach five classes per day—there would be some disgruntled student whose language was not addressed. Quote: "Mrs. Wang, where is the newsletter in my language? It's not fair that you have theirs and not mine," said one student. And my only reply to the students was, "I'm sorry, I don't have it in Farsi or Pushto." So the following month I decided that I would only distribute the newsletter in English, and there was not one protest among the students.

While this seems to be a simple solution to a not so large problem, the implications are very obvious. All the students knew that they were expected to master the English language and it would require some effort on their part to make this happen. The multilingual materials also sent out a definite message, in that certain language groups are favored over others. Additionally, many parents were illiterate in their own languages and, thus, it made no difference whether the printed materials were in English or in their native language. Due to the fact that some languages are not in written form, an interpreter should have been more appropriate. I personally believe that the interpreter would be acquired by the person himself or herself, rather than through the Government, through the public funds.

A teacher is supposed to be able to touch the future, and perhaps in this case I have done so. I saw the potential friction among groups, as well as the other waste of resources in printing these multilingual materials.

Just to give you another example, even among Chinese students who spoke Cantonese, they would congregate together. The Cantonese Chinese would be together and the Mandarin speakers—they're all Chinese—the Mandarin speakers would be all together. Right there, there would be two groups of Chinese students.

And within the community, you have the Chinese community that will have Shangtonese dialect club and the Taiwanese dialect club and the Hong Kong group, and you are talking a group of Chinese that are subdivided. I saw this.

You may argue that, as public servants, you would like to address all your constituents. The fact that less than 50 percent of all eligible voters participated in the 1988 Presidential election is indicative of the fact that it wasn't due to language barriers for the low turnout of voters; the fact that certain language groups show little interest in the voting process is not due to lack of bilingual ballots, but due to the cultural inhibitions.

This brings me to the second point of the bilingual ballots, why they are a divisive force. There will be no incentive to learn English since the translations are available. Moreover, public money will be used to reward those who do not try to learn English and those who care to make a difference.

The key to the low participation in the election is because of the lack of role models in the public domain. There are limited numbers of Senators, Congressmen, Congresswomen, Governors—or I don't think there's any; there's maybe in the past; there's one—in Delaware there's one Lieutenant Governor of Asian descent. Unfortunately, many Asian-Americans would only vote for Asian candidates regardless of their candidate's view on issues. This is not to say that only Asians are able to represent Asian-Americans, but the fact of the matter is those who need language assistance at the voting booth are also those who view this process as not so important.

What is the top priority is education and family and work. Why would the Government want to waste public dollars to print bilingual ballots when the cause, the low voter turnout, is due to lack of interest? If only less than 100 people in Sacramento requested the bilingual information out of the county's 550,000, then the need is not established.

As Americans, we're already diverse enough with our different religions, cultures, race, and backgrounds. Bilingual ballots would be another added burden to tear us further apart. There could be another cry of unfairness from the language minority groups, just like my students in the classroom.

Is it too much to ask the naturalized citizens to make some effort to learn English? Will we become the former Soviet Union with States breaking away from the Union due to the language pull? Will the concentration of large ethnic populations in the border States—it may be just an encouragement for these people to grow within rather than reach out to the mainstream. After all, there is a service provided at a cost that you and I must pay, and it's very comfortable to stay with your own ethnic group. I'm still going through that myself. It's very uncomfortable for me to come here to speak on this subject, even though I'm in the process of trying to mainstream.

In conclusion, I urge you to ponder very carefully, as a teacher, I have worked extensively with the LEP population and I think I have touched the future.

Mr. **EDWARDS.** Thank you very much, Ms. Wang.

[The prepared statement of Ms. Wang follows:]

PREPARED STATEMENT OF JOSEPHINE J. WANG, TEACHER, GAITHERSBURG, MD

GOOD MORNING, I AM JOSEPHINE J. WANG, FORMER DIRECTOR OF EDUCATION, POTOMAC CHINESE SCHOOL IN MONTGOMERY COUNTY, MARYLAND. I WOULD LIKE TO THANK THE DISTINGUISHED MEMBERS OF THE HOUSE SUBCOMMITTEE ON THE JUDICIARY FOR ALLOWING ME THE TIME TO EXPRESS MY IDEAS ON THE H.R. 4312 OF THE VOTING RIGHTS ACT. LET ME SAY A FEW WORDS ABOUT MYSELF SO YOU MAY HAVE A BETTER PROSPECTIVE AS TO WHERE I AM COMING FROM. I AM ONE OF THE MANY THOUSANDS OF IMMIGRANTS WHO BECAME NATURALIZED AFTER A PERIOD OF FIVE YEARS IN LEGAL RESIDENCE IN THIS COUNTRY. CURRENTLY I AM AN EMPLOYEE WITH ONE OF THE PUBLIC SCHOOL SYSTEMS.

SECTION 203 OF THE VOTING RIGHTS ACT WOULD APPEAR TO BE A VERY EXPENSIVE ENDEAVOR NOT TO MENTION THE DIVISIVE ELEMENTS.

I WILL GIVE TWO SPECIFIC EXAMPLES TO ILLUSTRATE MY POINT. FIRST, IT IS THE CASE OF THE MULTILINGUAL NEWSLETTER : JUST A FEW YEARS AGO, AS I WAS TEACHING A CLASS OF HIGH SCHOOL LIMITED PROFICIENCY STUDENTS IN A SCHOOL SYSTEM WHICH SERVICES OVER 4,000 LEP STUDENTS FROM AT LEAST 20 COUNTRIES. A MONTHLY NEWSLETTER WRITTEN IN ENGLISH AND TRANSLATED IN FIVE OTHER LANGUAGES WERE TO BE DISTRIBUTED AMONG STUDENTS. THESE LANGUAGES WERE : SPANISH, CHINESE, KOREAN, VIETNAMESE, AND CAMBODIAN. THERE WAS ALSO A PARENT HANDBOOK PRINTED IN THESE SAME LANGUAGES. UPON PASSING OUT THESE MATERIALS IN ALL MY CLASSES, THERE WOULD BE SOME QUITE UNHAPPY STUDENTS WHOSE LANGUAGE WAS NOT ADDRESSED. " MRS. WANG, WHERE'S THE NEWSLETTER IN MY LANGUAGE? IT'S NOT FAIR THAT YOU HAVE THEIRS AND NOT MINE." SAID ONE STUDENT. MY ONLY REPLY TO THE STUDENTS WAS, "I'M SORRY, I DON'T HAVE IT IN FARSI OR PUSHTO." THE FOLLOWING MONTH, I DECIDED THAT I WOULD ONLY DISTRIBUTE THE NEWSLETTER IN ENGLISH AND THERE WAS NOT ONE PROTEST AMONG THE STUDENTS.

WHILE THIS SEEMS A SIMPLE SOLUTION TO A NOT-SO-LARGE PROBLEM, ITS IMPLICATIONS ARE VERY OBVIOUS. ALL THE STUDENTS KNEW THAT THEY WERE EXPECTED TO MASTER ENGLISH AND IT WOULD REQUIRE SOME EFFORT ON THEIR PART TO MAKE THIS HAPPEN. THE MULTILINGUAL MATERIALS ALSO SENT OUT A MESSAGE : THAT CERTAIN LANGUAGE GROUPS ARE FAVORED OVER OTHERS. ADDITIONALLY, MANY PARENTS WERE ILLITERATE IN THEIR OWN LANGUAGES AND THUS IT MADE NO DIFFERENCE WHETHER THE PRINTED MATERIALS WERE IN ENGLISH OR IN THEIR NATIVE LANGUAGE. DUE TO THE FACT SOME LANGUAGES ARE NOT IN WRITTEN FORM, AN INTERPRETER WOULD HAVE BEEN MORE APPROPRIATE.(PROVIDED THAT THE PERSON IS A COMMUNITY VOLUNTEER. THIS WAY, NO PUBLIC FUNDS WOULD BE USED.)

A TEACHER CAN TOUCH THE FUTURE AND PERHAPS I HAVE DONE JUST THAT IN THIS CASE. I SAW THE POTENTIAL FRICTION AMONG GROUPS AS WELL AS THE UTTER WASTE OF RESOURCES IN PRINTING THOSE MULTILINGUAL MATERIALS.

YOU MAY ARGUE THAT AS PUBLIC SERVANTS, YOU WOULD LIKE TO ADDRESS ALL YOUR CONSTITUENTS. THE FACT THAT LESS THAN 50% OF ALL ELIGIBLE VOTERS PARTICIPATED IN THE 1988 PRESIDENTIAL ELECTION IS INDICATIVE OF THE FACT THAT IT WAS NOT DUE TO LANGUAGE BARRIER FOR THE LOW TURN-OUT OF VOTERS. THE FACT THAT CERTAIN LANGUAGE GROUP SHOWS LITTLE INTEREST IN THE VOTING PROCESS IS NOT DUE TO THE LACK OF BILINGUAL BALLOTS; BUT DUE TO CULTURAL INHIBITIONS.

THIS BRINGS ME TO MY SECOND POINT OF WHY BILINGUAL BALLOTS ARE A DIVIDING FORCE. THERE WOULD BE NO INCENTIVE TO LEARN ENGLISH SINCE THE TRANSLATIONS ARE AVAILABLE. MORE OVER, PUBLIC MONEY WOULD BE USED TO REWARD THOSE WHO DO NOT TRY AND TAX THOSE WHO CARE TO MAKE A DIFFEREENCE. THE KEY TO THE LOW PARTICIPATION THE THE ELECTION IS BECAUSE OF THE

LACK OF ROLE MODELS IN THE PUBLIC DOMAIN. THERE ARE LIMITED NUMBER OF SENATORS, CONGRESSMEN, CONGRESSWOMEN, GOVERNORS OF ASIAN DESCENT. UNFORTUNATELY, MANY ASIAN AMERICANS WOULD ONLY VOTE FOR ASIAN CANDIDATES REGARDLESS OF THE CANDIDATES' VIEWS ON ISSUES. THIS IS NOT TO SAY THAT ONLY ASIANS ARE ABLE TO REPRESENT ASIAN AMERICANS. BUT THE FACT OF THE MATTER IS THOSE WHO NEED LANGUAGE ASSISTANCE AT THE VOTING BOOTH ARE ALSO THOSE WHO VIEW THIS PROCESS AS NOT SO IMPORTANT. WHAT IS OF TOP PRIORITY IS EDUCATION AND HARD WORK.

WHY WOULD THE GOVERNMENT WANT TO WASTE PUBLIC DOLLARS TO PRINT BILINGUAL BALLOTS WHEN THE CAUSE FOR LOW VOTER TURN-OUT IS DUE TO LACK OF INTEREST? IF ONLY LESS THAN 100 PEOPLE IN SACRAMENTO REQUESTED THE BILINGUAL INFORMATION OUT OF THE COUNTY'S 551,028, THEN THE NEED IS NOT THERE.

AS AMERICANS, WE ARE ALREADY DIVERSE ENOUGH WITH OUR DIFFERENT RELIGIONS, CULTURES, RACE, AND BACKGROUNDS. BILINGUAL BALLOTS WOULD BE ANOTHER ADDED BURDEN TO TEAR US FURTHER APART. THERE COULD BE ANOTHER CRY OF UNFAIRNESS FROM THE LANGUAGE MINORITY JUST LIKE MY STUDENTS IN THE CLASSROOM.

IS IT TOO MUCH TO ASK THE NATURALIZED CITIZENS TO MAKE SOME EFFORT TO LEARN ENGLISH? WILL WE BECOME THE FORMER SOVIET UNION WITH STATES BREAKING AWAY FROM THE UNION DUE TO THE LANGUAGE PULL? WITH THE CONCENTRATION OF LARGE ETHNIC PUPULATION IN BORDER STATES, IT MAY BE AN ENCOURAGEMENT FOR PEOPLE TO GROW WITHIN RATHER THAN TO REACH TO THE MAINSTREAM. AFTER ALL, THERE IS A SERVICE PROVIDED AT THE COST FROM YOU AND ME.

IN CONLUSION, I URGE YOU TO PONDER CAREFULLY. I HAVE WORKED EXTENSIVELY WITH THE LEP POPULATION AND I HAVE TOUCHED THE FUTURE.

Mr. EDWARDS. Ms. Roessel, I think your testimony is that quite a number of the Navajo Tribe members don't speak English; is that correct?

Ms. ROESSEL. The Navajo Election Commission estimates that around 40 percent need some form of assistance to cast their vote, and it is estimated that over 80 to 85 percent of Navajos speak their language. So it's a very, very high percentage in terms of the Navajo Nation. As you know, we are the largest tribe in the country, and are still a very traditional tribe in terms of still practicing our culture and way of life.

Mr. EDWARDS. Well, how does the voting rights bill help, then, if there is no written language—is that correct?

Ms. ROESSEL. The way it really helps is, for us, the issue is not the bilingual ballot at all. It's the ability to have oral assistance. If I were a traditional Navajo person going to cast my vote, and I can't read the ballot, and somebody would be there in terms of a bilingual poll person that would assist in explaining the issues and making sure I understood what I was doing in terms of casting the vote—so it's oral assistance almost exclusively that we're looking at.

Mr. EDWARDS. One or two of my colleagues would ask, are the Navajos generally anxious to learn English, because it is the most useful language in the United States? I think we would all admit that in commerce and in general communication.

Ms. ROESSEL. Oh, certainly. I mean, I don't want to give the perception to the committee that we've alienated ourselves such that we don't see English as a means to communicate with the outside world. I don't think that's at all the Navajo Nation's position, but because of the influx of a dominant society, the Navajo Nation has had to consciously make the decision that if we want to retain our identity, we're going to have to consciously do that by instilling Navajo language courses as we can in the curriculum of our students, but at the same time, of course, they're learning English.

Mr. EDWARDS. Thank you.

Ms. Barnes.

Ms. BARNES. Yes. Ms. Roessel, today opponents to this legislation have expressed a concern that there might be problems in the translation of terms. Has your experience indicated that such problems exist; that electoral issues can't be effectively translated for bilingual assistance users?

Ms. ROESSEL. I don't know of the information or the statistics that I believe the gentleman from English First alluded to. He didn't really elaborate on it. So it's difficult for me to really, I think, make any truthful statements to the contrary or to figure out what he's intending.

But I think in terms of just a red flag or a redherring, I just can't make blanket statements that every time an individual is explaining a ballot, that they're doing it in the exact same fashion that it's written, because certainly the one challenge that anybody has in terms of interpreting something from one language to another is to make sure you get it as accurate as possible. When you have referendum issues that come up on the ballot, those I think are the more difficult translations, I would assume; like, for example, there might be an increase in a certain tax; there might be, you know, a constitutional amendment to the State constitution, those kinds of things. So that's why I would just refrain from saying that. I don't have any personal knowledge, but I can see that there would be, I guess—I don't know how it's done, but I would assume that you'd have to make sure that the people at the polls do the best job they can, and that's what they're there for. Obviously, they're not there to mislead anyone.

Ms. BARNES. Ms. Fung, do you have any experience that can add to that, based upon your work in New York?

Ms. FUNG. I would simply say that it is possible to translate ballot issues as well as other issues that appear before voters into other Asian languages. It can be done effectively.

Ms. BARNES. OK. My last question is a question that centers around English proficiency as an indicator of interest in the electoral process. I think during Ms. Wang's testimony she stated that there wasn't—that there's often an indication that there is correlation between the electoral process, and participation in education and learning the English language. Do you have any experience that would suggest that that's true or that it isn't true?

Ms. FUNG. I would simply say, in our experience among Asian-Americans, there is substantial interest in participating in the political process. It's manifested currently because there are many Chinese, Korean, Japanese language newspapers and media that are available to educate people about issues that will appear on the ballot.

I think at the same time it's pretty clear, whether you take it as a stereotype, that Asian-Americans place a very high value upon education and I think take seriously the need to learn English. I think there's nothing clearer from the Asian immigrant experience, that parents who have not spoken English well will stress upon their children the importance of learning English.

But in that transitional phase, and especially in New York City, which has a higher proportion, I think, of immigrants than other Asian populations in other parts of the country, there is a transitional period during which people who are eligible to vote are going to be impaired in exercising that right if they don't have this additional language assistance. But the interest is clearly there.

Mr. EDWARDS. Counsel.

Ms. HAZEEM. Thank you, Mr. Chairman.

Ms. Fung, you mentioned a transitional period. How long would that—is there any kind of indication of how long that transitional period would last?

Ms. FUNG. I don't know if there are any studies that have been done as to the Asian language populations.

Ms. HAZEEM. Ms. Wang, you work with limited English proficiency students.

Ms. WANG. Right.

Ms. HAZEEM. Are you aware of any transition period?

Ms. WANG. I would say about 3 years, 3 to 5 years.

Ms. HAZEEM. Is that primarily for schoolchildren or adults or——

Ms. WANG. For children. I don't have any benchmark in terms of adults with the language acquisition; I would imagine it would take a little longer.

Ms. HAZEEM. All right. Would you, Ms. Fung—is it Mrs. or Ms. or Ms.?

Ms. FUNG. Ms.

Ms. HAZEEM. All right. Do you think that would be accurate, 3 to 5 years? Or do you know?

Ms. FUNG. I can't answer the question. I'm not aware of any specific findings or research studies that have been done. They may well exist, and I will attempt to forward that information to you if I can locate it.

Ms. HAZEEM. OK.

Do you think 15 years is enough time?

Ms. FUNG. I'm not sure that I understand your question.

Ms. HAZEEM. Do you think 15 years is enough time to transition from another language to learning English?

Ms. FUNG. Well, I think it's not really whether I think it's an adequate period of time or not; it's a question of people making the transition as best they can. Many people who seek to learn English, for example, because at least in New York City, English classes are oversubscribed; hence, they may not begin that process as quickly as they can. Others who are educated in English language schools may have different rates of learning English. I can't answer that question. I think——

Ms. HAZEEM. So 15 years is not enough time? I'm just trying to get an answer. Do you think 15 years is enough time? You're saying for some people it is and for some people it isn't?

Ms. FUNG. Well, I'm afraid I can't answer the question. There are many people who are born here and are citizens who, at least in their own view, will self-identify themselves as not speaking English well, and yet they can participate fully in our society. And many of them will try to learn English as best they can.

Ms. HAZEEM. Do you know, why the 10,000 figure? Congressman Serrano has proposed that we would have an alternate benchmark. Only 5 percent of the limited English proficiency population, and the other would be 10,000. Can you tell me how—I know you didn't draft the legislation, but can you tell me, to the best of your knowledge, how they arrived at that 10,000 figure?

Ms. FUNG. Well, let me tell you what I think the impact would be on the Asian community and why I think that is a good figure to adopt. Obviously, we are all awaiting specific breakdowns from the Census Bureau concerning which counties would be covered. But, from the estimates that have been done, based on the percentage of those who speak English well, and under the 1980 census, it would seem that many of the counties in New York and in San Francisco would fall under 20,000 but would exceed 10,000 of those eligible. So if a 10,000 benchmark figure were adopted, it would pick up the largest concentration of Asian-Americans who would be eligible for assistance under section 203.

If a benchmark of 20,000 were adopted, which was the other figure that had been proposed, those jurisdictions—none of those jurisdictions might be covered. That is our estimate based on extrapolations from the 1980 census data.

Ms. HAZEEM. OK. Could I ask one more?

Mr. EDWARDS. Of course.

Ms. **Hazeem.** Well, two more actually. Do you know how many jurisdictions would be required to provide assistance in more than one language? As I understand the law now, the 5-percent threshold has to be met entirely by one language minority, and if you had 10,000, it seems that there would be situations in which—and I don't know that the Census data is available at this point in time—that would be covered perhaps under one Asian language and perhaps under Spanish. Are you aware of double coverage like that potentially in any of the jurisdictions?

Ms. **Fung.** I would guess that there would be coverage in San Francisco as well as in Queens County in New York City, Chinese and Korean.

Ms. **Hazeem.** I think I'll end here. Thank you, Mr. Chairman.

Mr. **Edwards.** Well, thank you all very much. You've been a great help to us and we appreciate your being here today.

The next panel—the next panel will be here tomorrow.

[Laughter.]

Mr. **Edwards.** Well, thank you all. The subcommittee is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

VOTING RIGHTS ACT: BILINGUAL EDUCATION, EXPERT WITNESS FEES, AND PRESLEY

THURSDAY, APRIL 2, 1992

House of Representatives,
Subcommittee on Civil and Constitutional Rights,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Michael J. Kopetski, and Henry J. Hyde.

Also present: Catherine LeRoy, counsel; Ivy Davis-Fox, assistant counsel; Melody Barnes, assistant counsel; Deborah Ward, secretary; and Kathryn A. Hazeem, minority counsel.

Mr. Edwards. The subcommittee will come to order.

As I was sitting here yesterday, when we had an excellent hearing bringing up to date the Voting Rights Act, I recall that Mr. Hyde and I and Harold Washington, who was a member of the subcommittee 10 years ago when the revision was made, the three of us traveled all over the South and the West holding hearings. It was quite a moving experience for all of us.

I remember the great shock that we had—and the original Voting Rights Act was passed in 1965, I believe—and this was in 1982. We really were shocked at the violations of the right to vote that we found in different parts of the country. It was really awful. It was frightening at the barriers that were put up on purpose by little local governments in certain areas, where the office of the registrar of voters would only be open Saturdays from 12 to 2 or something like that, or made purposely inconvenient and frightening to go over to the sheriff's office in certain rural areas so that people who came in would know they had better shape up or watch out. So we have made great progress.

So far in this series of hearings we're not getting the same kind of correspondence, the same kind of complaints, that we got from different parts of the country, so it's a hopeful sign and we hope to do better than ever as we mark up this bill after the hearings are completed.

Mr. Hyde.

Mr. Hyde. Thank you, Mr. Chairman.

First, Mr. Chairman, I have a letter from the American Legion, dated March 27, which I ask unanimous consent be inserted in the record.

Mr. Edwards. Without objection.

Mr. HYDE. Thank you.
[The letter follows:]

The American Legion

For God and Country

★ WASHINGTON OFFICE ★ 1608 "K" STREET, N.W. ★ WASHINGTON, D.C. 20006-2847 ★
(202) 861-2700 ★

March 27, 1992

Honorable Henry J. Hyde
House Judiciary Subcommittee on Civil
and Constitutional Rights
806 O'Neill House Office Building
Washington, DC 20515

Dear Representative Hyde:

The American Legion would like to express its views on the proposed reauthorization of the Voting Rights Act, Section 203 dealing with bilingual ballots.

For years, the Legion has been sympathetic to legal immigrants who seek to become U.S. citizens. To that end, our organization has supported bilingual programs of limited scope which allow new immigrants and budding citizens to acquire needed English-language skills in order to make their social and political transition as painless as possible.

One aspect of these programs is Section 203 of the Voting Rights Act, which provides bilingual ballots to certain voters who have very limited English-language skills. However, a recent legislative proposal would introduce a numerical criteria, which would unnecessarily expand the use of bilingual ballots in certain areas of the country heavily settled by illegal immigrants.

The American Legion opposes further extension or expansion of bilingual ballot programs under Section 203 for four specific reasons. First, bilingual ballots were originally touted to increase voting participation by minority-language voters. Figures from the U.S. Census confirmed that participation rates by these voters have declined since the enactment of Section 203.

Second, bilingual ballots promote and reinforce language separation. This inhibits minority-language persons from joining mainstream political debates, thus keeping intact the barriers of isolation between English-deficient voters and the rest of American society.

Third, bilingual ballots can be used to promote voter fraud. In 1982, the U.S. Attorney for San Francisco, CA investigated allegations of voter registration fraud among noncitizen voters. His investigations, which utilized random examinations of public records of recently-registered voters who used bilingual ballots, revealed that 27 percent of those checked were not citizens. This clearly indicates that the potential for voter fraud is present in any use of bilingual voting materials.

Finally, bilingual voting materials are a highly-visible symbol of the federal government becoming involved in state or local affairs which, given an opportunity, voters reject. The single most telling example took place in California in 1984 when 70 percent of the state's voters supported an initiative asking Congress to provide ballots only in English. To reinforce this particular point, a California poll conducted in 1990 revealed some highly interesting statistics; namely, that 90 percent of Filipino-Americans, 78 percent of Chinese-Americans, and 70 percent of Hispanic-Americans favored making English the official language of American government.

The American Legion urges rejection of Section 203. Our organization believes that any attempts to expand the use of bilingual ballots will only exacerbate current social and political conditions for English-deficient voters.

Sincerely,

Philip Riggin

Philip Riggin, Director
National Legislative Commission

Mr. HYDE. Today we resume our series of hearings on the proposed extension and expansion of section 203 of the Voting Rights Act. If Congress does not vote to reauthorize section 203, which requires covered jurisdictions to supply multilingual voting assistance, it will expire in August of this year.

In order to justify extension or even expansion of section 203, as Congressman Serrano has proposed, Congress needs more than exit polls and surveys conducted by advocacy and special interest groups. We need more than mere anecdotes and stories. We need objective and reliable evidence that bilingual ballots have proven effective.

I want to see statistical evidence that multilingual voting assistance actually works. I've heard testimony about how people like the ballots and that the absence of the ballots prevents them from voting, but I have not seen any statistic showing that there is an increase in registration or voting as a result of 17 years of multilingual voting assistance, nor has this subcommittee been offered any documented evidence of discrimination or denial of rights which would warrant Federal intervention into how State and local governments conduct their elections. I really fear the record thus far is too week to support either extension or expansion of section 203.

I hasten to add that that's my opinion—I'm sure it's not the chairman's or the majority on the committee—but I feel obliged to tell you how I feel. But I'm here to listen and to be persuaded. I want to thank every witness who is appearing here today and I look forward to hearing from each of them.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Hyde.

Will panel number one please approach and sit down at the witness table, Mr. Andrew Hernandez, Yvonne Lee, and Luis Caban.

Andrew Hernandez is someone who has helped us over a long period of time in these important cases. He is with the Southwest Voter Registration Education Project in San Antonio, TX. Mr. Hernandez, welcome. You may proceed.

Without objection, all of your statements will be printed in full in the record. We're trying as best we can, because of House business coming up at 11 o'clock or so, to limit you to a generous 5, 6 or 7 minutes. Please go ahead.

STATEMENT OF ANDREW HERNANDEZ, PRESIDENT, SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT

Mr. HERNANDEZ. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, thank you for allowing us to share our concerns concerning section 203 regarding bilingual assistance of the Voting Rights Act. My name is Andrew Hernandex. I am here as president of the Southwest Voter Registration Education Project. The Southwest Voter Registration Education Project is a nonprofit, nonpartisan organization committed to raising the level of political participation of minorities, particularly Hispanics and native Americans in the Southwest. Since its inception in 1974, the Southwest Voter Registration Education Project has conducted over 1,500 voter registration and voter education campaigns in over 200 cities in the Southwest, and have successfully litigated or have been part of litigation in over 90 voting rights lawsuits.

For 17 years now, the Southwest Voter Registration Education Project has sought to integrate Hispanics into the civic life of our Nation. In those 17 years, we have witnessed a phenomenal increase in Hispanic registration and voting such that about 2 years ago, in a report by the Bureau of Census, the survey report suggested that Hispanics are now the fastest growing group when it comes to registering and voting in this country.

Hispanics have gone from a people who didn't vote, who didn't participate, to a people who are experiencing a rapid integration into the American democratic process. In terms of actual numbers of people registering and actual numbers of people voting, in 1976 there were 1.5 million Hispanic voters, and presently there are over 5 million. And those aren't figures put forth by any advocacy group or special interest group. Those come out of the current population survey reports that have been used by this committee.

Indeed, from 1980 to 1990, the rate of Hispanic citizens actually voting increased five times the rest of the Nation. That is to say, if you take the actual number of Hispanics voting in 1989 and the number voting in 1990, the actual increase was 51 percent in the actual number of Hispanics voting and 53 percent in the actual number registered. Compare that to a 10-percent increase in the number of whites voting, and an 8-percent increase in the number of whites registered to vote. This also comes out of the current population reports of the U.S. Bureau of the Census, years P20, numbers 370 and 435.

So if one wants to argue where's the factual data, one only has to go to those reports to get the factual data. The fact of the matter is, we have five times the rate of increase of any other group in this country.

Along with this phenomenal increase in the number of Hispanic voters, there has been a corresponding increase in the number of Hispanic elected officials. In 1974, there was a little under 1,400 Hispanics who held elective office. Now there are over 4,000. Those are hard data, easily documented.

If you look at a State-by-State comparison, in 1976 there were 488,000 Hispanics registered to vote in Texas. That's a number that is derived by taking the number of Spanish surname registered voters off the list of registered voters and counting them. In 1990, there were over 1.1 million Hispanics registered to vote in Texas. We have seen similar increases across the Southwest, so the fact of the matter is, the Hispanics have doubled their vote, doubled the number of persons voting, the actual number of people showing up on election day, and doubled the number of Hispanic elected officials. All the evidence suggests that, by our rate of increase, by our rate of integration, all the evidence suggests that Hispanics are now mainstreaming into this Nation's democratic process.

At a time when many Americans are dropping out of the political system, Hispanics are buying in in record numbers.

Let me put another caveat in here because I think, if the concern is really about what has been the impact, then the factual data should be compelling enough. If you take the reports, the current population reports, for 1988 and for 1984, and you compare the increase of Hispanic voters from 1984 to 1988, there was an increase of 618,000 in the number of Hispanic voters from 1984 to 1988. The Nation as a whole, including Hispanics, only increased by 350,000. So had not Hispanics increased in the rate that they did, the Nation as a whole would have actually suffered a decline in the number of people voting in 1988. I have to say that in 1988, Hispanics kept the vote afloat. That comes out of the current population surveys. If you do the mathematics, they'll come out the same.

After 1,500 voter registration and voter education campaigns, and close to 100 successful voting rights lawsuits, we at the Southwest Voter Registrtion Education Project think we have learned some things about why Hispanics are now mainstreaming into our Nation's civic life and what prevented them from doing so in the past.

One of the things we learned early on was that Hispanics did not vote because they were prevented or discouraged from doing so. There was apathy in our community. It was, however, induced apathy. It was brought about by an array of election devices and systems that made it difficult, if not impossible, for Hispanics to fully participate.

It was an apathy that was induced by outright gerrymandering and at-large election schemes that rendered our vote meaningless. It was an apathy induced by poll taxes, literacy tests, and English-only ballots that made the exercise of the most fundamental franchise of democracy and citizenship and arduous and, at times, impassable process. It was an apathy created by a system that was set up to block people from participating, not to bring them in. Hispanics weren't simply left out or left behind; they were shut out.

When we began the process of removing the barriers, like monolingual ballots or English-only ballots, Hispanics began to vote. Once the booth of electoral opportunity was opened to Hispanics, they walked in. Hispanics are now mainstreaming into the political life of our Nation because the barriers were brought down.

Probably no better evidence of this is what's going to happen in this election year. Both parties, all the candidates, are going to be wooing Hispanic votes. If we weren't voting in large numbers, if we hadn't increased our vote, then I don't think you would see that happening. It would be ridiculous for that to happen. The fact that all the parties and all the candidates now seek Hispanic voters tells me that they read the bottom line, that the Hispanic vote is increasing.

A monolingual, English-only, election process would exclude up to 20 percent of the adult Hispanic population. This could mean across the Nation that 1.8 million Hispanic citizens would be disenfranchised of their most fundamental right as a citizen of our Nation.

Since the issue was raised about exit polls, I would challenge this committee to examine the methodology that was applied in using those exit polls, to examine whether or not the questions don't come out of the same kind of questions that the L.A. Times does or the ABC does or any other national, reputable polling firm. In fact, our polling—because you made reference to those polls—the Southwest Voter Research Institute's polling is so good that we have been asked to participate in conferences of the major network pollsters, and we were recently asked to present a paper at the Field Institute in California just 2 weeks ago, because our methodology is so much sounder and our samples so much bigger, and we're so much better at it. So if anybody wants to challenge whether or not the polls are reliable, I suggest that they get a group of experts who do polling and ask the tough questions about whether or not the methodology was followed to give us scientific results.

You know, we would be willing to put that poll through any group of experts and to ask that question: Is the methodology and and were the questions asked in a fair way? I think we'll pass that with flying colors because our reputation and our credibility is based on our ability to tell the truth in these matters.

Not only do Hispanic voters use bilingual ballots in significant numbers, there is overwhelming support for the provision of bilingual ballots among all Hispanic voters. When Hispanic voters in the March 10, 1992, Texas primary were asked whether the ballots should be printed in both languages for those who do not speak English, over 95 percent said they should be printed in both languages. You're going to find overwhelming support for bilingual ballots within our community.

Hispanic voters utilize bilingual ballots and they support their provision in overwhelming numbers. On that point there can be little factual dispute. Nor can it be disputed that a lack of bilingual ballots will have the effect of pushing out those who are now participating in the process.

Now, what some are willing to dispute is the idea that citizens who do not speak English or who are not comfortable with English should not be afforded the right to vote. The logic is simple: If you don't speak English, you don't have a right to vote. English proficiency, not citizenship, becomes the basic qualification for voting. This is an interesting notion of American citizenship. The more English you speak, the more right you possess; the less English you speak, the more rights you lose. It's almost a situation like in South Africa, where we have the rights of citizens based on the color of their skin, with different colors of skins being given a different set of rights. Now we're asking of ourselves that we set up the idea of citizenship based on English proficiency. That is to say, the less English you speak, the less rights you will have.

Now, it's interesting to me that this argument should be made, because certainly no one has asked Hispanic citizens how much English they know when it comes to paying their taxes; no one asks us how much English we know around IRS time; no one asks Hispanic citizens how much English they knew when they were asked to send their sons and daughters to fight and die in foreign lands for the freedom of this country. No one asked them how much English they knew then.

If English proficiency is not considered when it comes to paying taxes or defending our Nation, and living out the obligations of citizenship to the Nation, then it should not be considered when it comes to exercising those rights associated with citizenship.

There are those who argue that the implementation of section 203 of the Voting Rights Act cost too much for what it brings. Putting aside the argument that citizenship should not have a price tag attached to it, the fact of the matter is that close to 2 million Hispanics now have the possibility of voting and, in all likelihood, would not have the possibility of voting were it not for bilingual ballots. The cost of administering such programs against the long-term gain for the expansion of civic participation in our Nation is really quite minimal.

And if those who oppose bilingual ballots on the grounds of the costs to taxpayers were really honest, if they were really honest, they would have to acknowledge that those 2 million Hispanics utilizing and potentially utilizing bilingual ballots are also taxpayers, who are paying much more in taxes than what is being spent to open the electoral process to them. They are also taxpayers.

Hispanics are mainstreaming into the political life of our Nation. Monolingual ballots will not bring people in. They will shut people out. English-only ballots will have the practical consequence of not only keeping people out of the mainstream of American life, but also of pushing out those who have already arrived. What this means is fewer Hispanics voting and a stunted integration of Hispanics into our Nation's civic life. That just not bad for Hispanics; it's bad for democracy.

It is for this reason that the Southwest Voter Registration Education Project supports the reauthorization of section 203 of the Voting Rights Act.

I would like to ask the chairman's and the committee's indulgence to insert into the record the information data indicating a large increase in Hispanic voting, across all the States in the Southwest, and insert into the record at a later point, as soon as I get back to my office, the Census Bureau data and the quote from the Census Bureau that we're now the fastest growing when it comes to voting in the country.

Mr. EDWARDS. That will be accepted for the record, without objection.

Mr. Hernandez, thank you for your testimony.

[The prepared statement of Mr. Hernandez, with attachments, follows:]

TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

By the Southwest Voter Registration
Education Project

Mr. Chairman and Members of the Committee:

Thank you for allowing us to share our concerns with this Committee on Section 203 concerning bilingual assistance of the Voting Rights Act. My name is Andrew Hernandez. I am here as the President of the Southwest Voter Registration Education Project. The Southwest Voter Registration Education Project is a non-profit non-partisan organization committed to raising the level of political participation of minorities, particularly Hispanics and Native Americans in the Southwest. Since its inception in 1974 SVREP has conducted over 1,500 voter registration and voter education campaigns in over 200 cities and have successfully litigated over 90 voting rights and vote dilution lawsuits.

For 17 years now, the Southwest Voter Registration Education Project has sought to integrate Hispanics into the civic life of our nation. In those 17 years we have witnessed a phenomenal increase in Hispanic registration and voting such that the U.S. Bureau of the Census informs us that Hispanics are now the fastest growing group in registration and voting in the country.

Hispanics have gone from a people who didn't vote, who didn't participate, to a people who are experiencing a rapid integration into the American democratic process. In 1976 there were 2.5 million Hispanic voters, presently there are over 5 million.

Indeed from 1980 to 1990 the rate of Hispanic citizens voting increased five times the rate of the rest of nation.

Along with this phenomenal increase in the number of Hispanic voters, there has been a corresponding increase in the number of Hispanic elected officials. In 1974 there were a little under 1,400 Hispanics who held elective office. Now there are over 4,000.

Hispanics have doubled their vote and have doubled the number of Hispanic elected officials. All the evident suggest Hispanics are now mainstreaming into our nation's democratic process.

At a time when many Americans are dropping out of the political system, Hispanics are buying in record numbers.

After 1,500 voter registration and voter education campaigns and close to 100 successful voting rights lawsuits, we at Southwest Voter Registration Education Project think we have learned something about why Hispanics are now mainstreaming into our nation's civic life and what had prevented them from doing so.

One of the things we learned early on was that Hispanics did not vote because they were prevented or discouraged from doing so.

There was apathy in our community. It was, however, "induced apathy" brought about by an array of election devices and systems that made it difficult if not impossible for Hispanics to fully participate.

> It was an apathy that was induced by outright gerrymandering and at large election schemes that rendered Hispanic meaningless.
>
> It was an apathy induced by poll taxes, literacy tests, and English only ballots that made the exercise of the most fundamental franchise of democracy and citizenship - the vote - a difficult, arduous process, and at times impassable process.
>
> It was apathy created by a system that was set up to block people from participating not to bring them in:
>
> Hispanics weren't simply left out or left behind -
> Hispanics were shut out!

When we began the process of removing the barriers like monolingual ballots or English only ballots Hispanics began to vote. Once the booth of electoral opportunity was opened to Hispanics, they walked in.

Hispanics are now mainstreaming into the political life of our nation because the barriers were brought down.

The provision of bilingual ballots and bilingual election processes is critical to the continuation of this integration of Hispanics into our nation's civic life.

An monolingual, English only election process would exclude up to 20% of the adult Hispanic population. This could mean that over 1.8 million Hispanic citizens would be disenfranchised of their most fundamental right as a citizen of our nation. The right to cast an effective vote.

Exit Polling in Texas, California, and New Mexico from 1984-1992 suggests that up to 20% of Hispanics, voting on election day make use of bilingual ballots. (See Appendix A)

Not only do Hispanic voters use bilingual ballots in significant numbers there is overwhelming support for the provision of bilingual ballots among all Hispanic voters. When Hispanic voters in the March 10, 1992 Texas Primary were asked whether the ballots should continue to be printed in both languages for those who do not speak English over 95% said they should be printed in both languages. (See Appendix B)

Hispanic voters utilize bilingual ballots and they support their provision in overwhelming numbers. On that point there can be little factual dispute. Nor can it be disputed that a lack of bilingual ballots will have the effect of pushing out those who now are participating in the process.

What some are willing to dispute is the idea that citizens who do not speak English or not comfortable with English should be afforded the right to vote. The logic is simple. If you don't speak English, you don't have a right to vote. English proficiency, not citizenship becomes the basic qualification for voting.

Now this is an interesting notion of American citizenship. The more English you speak, the more right you posses, the less English you speak, the more rights you loose.

No one asks Hispanic citizens how much English they know when it comes time to pay their taxes. No one asked Hispanic citizens how much English they knew when they have been asked to give their sons and daughters to fight and die in foreign lands for the freedom of our nation. If English proficiency is not considered when it comes to paying taxes or defending our nation and living out the obligations of citizenship to the nation, then it should not be considered when it comes to exercising those rights associated with citizenship.

There are those who argue that the implementation of Section 203 of the Voting Rights Act cost too much for what it brings. Putting aside the argument that citizenship should not have a price tag attached to its free and full exercise, the fact of the matter is that closed to two million Hispanics are now voting that in all likelihood would not be voting were it not for bilingual ballots. The cost of administering such programs against the long term gain for the expansion of civic participation in our nation is actually quite minimal.

And if those who oppose bilingual ballots on the grounds of the costs to taxapyers were really honest, they would have to acknowledge that those two million Hispanics utilizing bilingual ballots are taxpayers who are paying much more in taxes than what is being spent to extend and open the electoral process to them.

Hispanics are mainstreaming into the political life of our nation. Monolingual ballots will not bring people in; they will keep them shut out. English only ballots will have the practical consequence of not only keeping people out of the mainstream American life but also of pushing out those who have already arrived. What it will mean is fewer Hispanics voting, and a stunted integration of Hispanics into our nation's civic life. That's just not bad for Hispanics, it's bad for democracy.

It's for that reason the Southwest Voter Registration Education Project supports the reauthorization of Section 203 of the Voting Rights Act.

Thank you for your attention.

APPENDIX A

Ballot Language Used by Latinos in Voting: 1984-1990

	Nov-84	Mar-88	Nov-88	Mar-90	Nov-90
TEXAS					
English only	75	74	81	82	74
Spanish only	7	6	5	1	8
Both	18	20	14	17	18
Number	1,012	1,939	2,694	1,351	1,480
CALIFORNIA					
English only			90		82
Spanish only			4		9
Both			6		9
Number			1,716		541
NEW MEXICO					
English only			80		
Spanish only			2		
Both			18		
Number			1,312		

APPENDIX B

TEXAS LATINO VOTERS AND THEIR USE OF THE BILINGUAL BALLOT IN 1992

Distribution of Hispanics		Version of Ballot Used			Support Bilingual Ballots	
		English only	Spanish only	Both Lang.	Yes	No
	GENDER					
46	Male	71	9	21	94	5
54	Female	76	4	20	96	4
	AGE GROUP					
12	18-25	73	1	27	99	2
23	26-35	81	1	18	96	4
26	36-45	76	2	23	93	7
19	46-55	71	10	19	94	5
13	56-65	62	16	22	98	2
8	66 or older	62	18	20	95	5
	EDUCATION					
28	Some high school or less	57	16	27	95	5
35	High school graduate	76	2	22	96	4
25	Some college	86	1	14	95	5
12	College graduate	78	5	17	98	2
	HOUSEHOLD INCOME					
21	Less than $10,000	58	11	31	95	5
24	$10,000-$20,000	68	7	25	97	3
22	$20,000-$30,000	78	5	18	95	5
15	$30,000-$40,000	88	1	11	94	5
9	$40,000-$50,000	81	1	18	95	5
6	$50,000-$60,000	84	0	16	97	3
4	$60,000 or more	68	15	17	95	5
	UNION MEMBER IN HOUSEHOLD					
30	Yes	68	8	24	98	2
70	No	76	6	19	94	5
	POLITICAL ORIENTATION					
29	Liberal	73	6	21	97	3
45	Moderate	74	6	20	94	6
26	Conservative	71	4	25	96	4

Source: Southwest Voter Research Institute exit poll of 974 Hispanic voters in Texas March 10, 1992.

Mr. **EDWARDS**. The next witness is Yvonne Lee, executive director of the Chinese-American Citizens Alliance from San Francisco, the home of the San Francisco Giants, who are going to shortly move to San Jose, my hometown.

[Laughter.]

Ms. **LEE**. I'm very envious of you, Mr. Chairman.

STATEMENT OF YVONNE Y. LEE, NATIONAL EXECUTIVE DIRECTOR, CHINESE AMERICAN CITIZENS ALLIANCE

Ms. **LEE**. Good morning, Chairman Edwards, and members of the committee. I am Yvonne Lee, executive director of the Chinese-American Citizens Alliance, commonly known as CACA. CACA is a national, nonprofit, nonpartisan membership civil rights organization. Since its formation, CACA has worked to uphold the rights of Chinese-Americans, and one of the most fundamental is our right to participate in the democratic process.

Based on our 97 years of advocacy work on behalf of Chinese-Americans, CACA strongly urges the Congress to enact legislation, number one, to extend section 203 of the Voting Rights Act to the year 2007, and number two, to require jurisdictions with 10,000 or more limited or non-English speaking voting age citizens of a specific language minority group to provide voting assistance in that language in addition to English. My testimony is also supported by the National Coalition of Language Minority Voting Rights.

I will focus my testimony on three main areas: The San Francisco County experience of trilingual language assistance, the cost effectiveness, and the need for expanded coverage.

Historically, Asian-Americans have faced a variety of discriminatory laws and practices which have effectively disenfranchised our community. When CACA was formed, Chinese-Americans were not allowed to testify in courts for or against whites. The California Supreme Court, in 1894, held that the Chinese are "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point; and to allow them to testify would admit them to all equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls."

Until 1943, when the Chinese Exclusion Act of 1882 was finally repealed, Chinese-American permanent resident aliens were denied their right to become naturalized citizens, thereby not allowed to participate in the electoral process. Even after they became naturalized citizens, but because of limited educational opportunities afforded them, they were unable to fully understand and thus take part in the voting process.

Since those days of blatant separatism, our country has made much progress to remedy past exclusionary laws. Today, CACA is headed by Justice Harry Low, our Nation's first Chinese-American appellate court jurist. In 1965, Congress passed the Voting Rights Act, one of the most significant civil rights laws in our Nation's history. Also, recognizing that English-only elections have effectively denied a substantial language minority community's right to vote, Congress amended section 203, the language provisions to the Voting Rights Act, in 1975. For the first time, thousands of previously shut out Americans were able to exercise their most fundamental rights as citizens.

Since San Francisco has been the only county providing Asian language assistance, I will focus my testimony on the San Francisco experience.

The city and county of San Francisco was initially reluctant to comply fully with the Voting Rights Act. Pressure from the community and the Federal Government, and a consent decree resulting from a Department of Justice lawsuit in 1980, assured that language minority citizens in San Francisco would be provided language assistance.

But in 1982, the U.S. Congress voted to extend the language provisions of the Voting Rights Act, along with an amendment by Senator Nickles, which unfortunately reduced the number of counties required to provide language assistance. Under this amendment, the Director of the U.S. Bureau of Census determined in 1984 that San Francisco's limited and non-English speaking Chinese-American citizens did not constitute 5 percent of the total qualified voting age population in San Francisco. Therefore, San Francisco was no longer required to conduct its elections in any languages other than English. Nevertheless, San Francisco has continued to provide language assisted elections to its voters because of the consent decree. Today, we are very fortunate to have a very committed office of registrar of voters who has been providing Spanish and Chinese language assistance to limited and non-English speaking citizens in San Francisco.

There are those who would argue against providing bilingual ballots in these times of budgetary constraints, but one's constitutional rights must not be compromised by financial consideration. Furthermore, San Francisco has demonstrated that it has successfully carried out its trilingual program at a very minimum cost.

According to the registrar's office, the total cost of the November 1991 election was $1.1 million. The cost for the bilingual portion of this election was $42,000, or less than 4 percent of the total cost of the election. The San Francisco program clearly demonstrates that cost is not a prohibitive factor and multilingual elections can, indeed, be conducted in a cost-effective and manageable manner.

Just to show you what San Francisco is providing, these are the Chinese voting materials, which includes the registration form, the absentee ballot, and also the whole booklet itself, which is more than 162 pages.

Since the enactment of section 203 in 1975, the Asian-American population has grown dramatically, more than doubling its population since then. According to the 1990 census, there are now over several million Asian-Americans, with over 40 percent of them residing in California.

But the most dramatic shift of our community is the characteristic changes. Prior to the 1965 Immigration Reform Act, the Asian-American community was comprised of a small population of primarily native born Asian-Americans, solely due to restrictive immigration laws barring family unity for Asian-Americans. Immigration reform in 1965 finally has enabled family unity between Asian-Americans and their relative in Asia. Over 50 percent of today's Asian-Americans, and 64 percent of the Chinese-Americans, are foreign born. According to the Immigration and Naturalization Service statistics, over 2.4 million people from Asia have legally immigrated to the United States between 1980 and 1989.

There are some who have misconceptions that newcomers do not wish to assimilate into their new country's ways. In reality, our newest members take great pride and interest in their adopted country's public policies, leadership and community affairs which affect their daily lives. This is evidenced by the over 12 Chinese language papers offered in cities with large Chinese populations. They also want to learn the English language for survival, economic and social necessity. But learning a new language, especially in most cases for middle age persons who must also work full time, can be extremely difficult.

Despite their handicap, the newcomers have enrolled themselves in adult and community college courses on English and citizenship. For example, in the San Francisco community college center serving the Chinatown area, there are currently 1,185 persons enrolled in citizenship classes, but there are over 1,600 persons on the waiting list. The average age of the students is 54 years of age. Moreover, according to the dean of the center, their students have a very high rate of passing the citizenship test. In fact, according to the Immigration and Naturalization Service, Asians have consistently ranked at or near the top of becoming citizens.

With their newly attained citizenship, most, unfortunately, have yet to exercise their right to vote. One of the primary reasons is that they are intimidated by the complexities of the voting materials and process. The English language that they have learned may have prepared them to gain citizenship, but it is grossly insufficient for them to comprehend the confusing and often perplexed election issues and materials.

For example, this is a three-page study course for people who are studying for the citizenship test. One sample question is, "When is Independence Day?" This is the recent San Francisco voters pamphlet, a 165-page booklet. On one of the propositions, a nuclear free zone, just the text itself is all these. I must confess, I didn't even read this myself, and I've got a college degree from the University of California.

From our experience of conducting voters registration for over two decades in various CACA chapter cities, we have found the most success in San Francisco because we were able to assure potential voters that assistance will be offered in their native language. With Chinese language assistance, voters do feel secure and assured enough to cast their informed votes.

Despite the importance and demonstrated success of bilingual elections, no counties outside Hawaii will be required to offer Asian language assistance under the current 5-percent criteria. Asian-Americans living in largely populated metropolitan counties are deprived from bilingual ballots because of the 5-percent requirement that we have now.

To correct this inequity, we support the proposal of adding a numerical threshold as an alternative to the 5-percent standard of coverage. With a proposed 10,000 benchmark, counties such as San Francisco, Los Angeles, Kings, Queens, and New York, and eventually Santa Clara and also Alameda in California, would be mandated to provide Asian language assistance. Absent such a benchmark, the intent of the Voting Rights Act remains a hollow promise to thousands of Asian-Americans.

In conclusion, our community deems the Voting Rights Act, section 203, with the adoption of the 10,000 numerical threshold, as the key to our community's role as equal participants in the democratic process. We know first hand in San Francisco how bilingual language assistance has benefited the thousands of citizens who otherwise cannot participate. This participation is guaranteed to all Americans, whether native born or naturalized. It is imperative for the Congress to act decisively to adopt both the extension and expanded coverage of section 203 so to ensure the enfranchisement of its language minority citizens.

We thank you for your attention.

Mr. EDWARDS. Thank you very much. That's very helpful testimony.

[The prepared statement of Ms. Lee follows:]

PREPARED STATEMENT OF YVONNEY Y. LEE, NATIONAL EXECUTIVE DIRECTOR, CHINESE AMERICAN CITIZENS ALLIANCE

Congressman Edwards and members of the U.S. House Subcommittee on Civil and Constitutional Rights, I am Yvonne Lee, executive director of Chinese American Citizens Alliance(C.A.C.A.), a national non-partisan membership civil rights organization. Since its formation, C.A.C.A. has worked to uphold the rights of Chinese Americans, and one of the most fundamental is our right to participate in the democratic process.

Base on our ninety seven years of advocacy work on behalf of Chinese Americans, C.A.C.A. strongly urges the Congress to enact legislation to extend Section 203 of the Voting Rights Act to the year 2007 and to require jurisdictions with 10,000 or more limited or non-English speaking voting age citizens of a specific language minority group to provide voting assistance in that language in addition to English.

I will focus my testimony on three main areas: the San Francisco County experience of tri-lingual language assistance: cost effectiveness; and the need for expanded coverage.

Historically, Asian Americans have faced a variety of discriminatory laws and practices which have effectively disenfranchised our community. When C.A.C.A. was formed, Chinese Americans were not allowed to testify in courts for or against whites. The California Supreme Court in 1894(People v. Hall, 4 Cal. 339,405 1894) held that the Chinese are "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point: and to allow them to testify would "admit them to all equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls."

Until 1943, Chinese American permanent resident aliens were denied their right to become naturalized citizens, thereby not allowed to participate in the electoral process. Even after they become naturalized citizens, but because of limited educational opportunities afforded them, they were unable to fully understand and thus take part in the voting process.

Since those days of blatant separatism, our country has made much progress to remedy past exclusionary laws. Today, C.A.C.A. is headed by Justice Harry Low, our nation's first Chinese American appellate court jurist. In 1965, Congress passed the Voting Rights Act, one of the most significant civil rights laws in our nation's history. Also, recognizing that English-only elections have effectively denied a substantial language minority community's right to vote, Congress amended Section 203, the language provisions, to the Voting Rights Act, in 1975. For the first time, thousands of previously shut out Americans were able to exercise their most fundamental rights as citizens.

THE SAN FRANCISCO LANGUAGE ASSISTANCE PROGRAM

While the City and County of San Francisco was initially reluctant to comply fully with the Voting Rights Act, pressure from the community and federal government and a consent degree resulting from a lawsuit filed by the U.S. Department of Justice in May of 1980 assured language minority citizens in San Francisco would be provided language assistance.

But in 1982, the U.S. Congress voted to extend the language provisions of the Voting Rights Act along with an amendment by Senator Nickles which unfortunately reduced the number of counties required to provide language assistance. Under this amendment, the Director of the U.S. Bureau of Census determined that San Francisco's limited and non-English speaking Chinese Americans citizens did not constitute five percent of the total qualified voting age population in San Francisco. Therefore, San Francisco was no longer required to conduct its elections in any languages other than English under the provisions of the 1982 reauthorization of the Voting Rights Act. Nevertheless, San Francisco has continued to provide language assisted elections to its voters to this day only because of the consent decree. Today, we are fortunate to have a very committed office of the Registrar of Voters who has been providing Spanish and Chinese language assistance to limited and non-English speaking citizens in every election.

COST EFFECTIVENESS OF BILINGUAL BALLOTS

There are those who would argue against providing bilingual ballots in times of tight budgets. We strongly believes one's constitutional rights must not be comprised by financial considerations. Furthermore, the San Francisco Registrar of Voters has managed to successfully carry out its tri-lingual program in a highly cost effective manner.

According to the Registrar's office, the total cost of the November 1991 election was 1.1 million dollars. The item cost is as follows:

$400,000	office personnel
187,000	ballots, supplies, equipment
165,000	poll workers
36.000	computer service and maintenance
30,000	polling place supplies
240,000	English ballot pamphlets
22,000	Chinese ballot pamphlets(translation & typesetting)
19,000	Spanish ballot pamphlets(translation & typesetting)
1,000	recruitment of bilingual poll workers

The cost of the bilingual portion of this election was $42,000 or less than 4% of the total cost of the election. The San Francisco program clearly demonstrates that cost is not a prohibitive factor and multilingual elections can indeed be conducted in a cost-effective and manageable manner.

NEED FOR LANGUAGE ASSISTANCE

Since the enactment of Section 203 in 1975, the Asian American population has grown drastically, more than doubling its population. According to the 1990 Census, there are over 7 million Asian Americans, with over 40% of them residing in California.

But the most dramatic shift of our community is the characteristic changes. Prior to the

1965 Immigration Reform Act, the Asian American community was comprised of a small population of primarily native born Americans of Asian ancestry, solely due to restrictive immigration laws barring family unity for Asian Americans. Immigration reform in 1965 finally has enabled family members from Asia to be reunited with their relatives in this country. Over 50% of today's Asian Americans, and 64% of the Chinese Americans are foreign born. According to the Immigration and Naturalization Service statistics, over 2.4 million people from Asia have legally immigrated to the U.S. between 1980 to 1989.

There are some who have misconceptions that newcomers do not wish to assimilate into their new country's ways. In reality, our newest members take great pride and interest in their adopted country's public policies, leadership, and community affairs. This is evidenced by the over twelve Chinese language papers in cities with large Chinese populations. They also want to learn the English language for survival, economic and social necessity. But learning a new language , in most cases for middle age persons who also must work full time, can be extremely difficult.

Despite their handicap, the newcomers have enrolled themselves in adult and community college courses on English and citizenship. In the San Francisco community college center serving the Chinatown community, there are currently over 1,000 persons on the waiting list to learn English and citizenship. Moreover, according to the dean of the center, the students have a very high rate of passing the citizenship test. In fact, according to the Immigration and Naturalization Service, Asians have consistantly ranked at or near the top of naturalization rates.

With their newly attained citizenship , most have yet exercised their right to vote. One of the primary reasons is that they are intimidated by the complexities of the voting materials and process. The English language that they have learned may have prepared them to pass the citizenship test, but it is grossly insufficient for them to comprehend the confusing and perplexed election issues and materials.

From our experience of conducting voters registration for over two decades in our various chapter cities,, we have found the most success in San Francisco because we were able to assure the new voters that assistance would be offered in their native language.
With language assistance, voters do feel secured and assured enough to cast their informed votes.

Despite the importance and demonstrated success of bilingual elections, no counties outside Hawaii will be required to offer Asian language assistance under the current 5% criteria. Asian Americans living in largely populated metropolitan counties such as Los Angeles(245,033 Chinese, 219,653 Filipinos, 145,431 Koreans), San Francisco(127,140 Chinese, and Kings(68,191 Chinese), Queens(86,885 Chinese, 49,088 Koreans, 22,324 Filipinos) and New York county(71723 Chinese) in New York, are deprived from bilingual ballots because of this 5% requirement.

To correct this inequity, we support the proposal of adding a numerical threshold as an alternative to the 5% standard of coverage. With a 10,000 or benchmark, counties such as San Francisco, Los Angeles, Kings, Queens, and New York would be mandated to provide Asian language assistance. Absent such a benchmark, the intent of the Voting Rights Act remains a hollow promise to the Asian American community.

In conclusion, our community deems the Voting Rights Act's Section 203, with the adoption of the 10,000 numerical threshold, as the key to our community's role as equal participants in the democratic process. We know first hand in San Francisco how bilingual language assistance have benefitted thousands of citizens who have the opportunity to vote and participate in the electoral process. This participation is guaranteed to all citizens, whether native born or naturalized. It is imperative for the Congress to act decisively to adopt both the extension and expanded coverage of Section 203 so to ensure the enfranchisement of its language minority citizens.

Mr. **EDWARDS.** The last witness on this panel to testify is Luis Caban. He is associate executive director of the Midwest-Northeast Voter Registration Education Project. Formerly, Mr. Caban served as technical consultant to the Voter Registration Committee of the National Democratic Committee, and he has also held elective and appointive office in New York.

Welcome. You may proceed.

STATEMENT OF LUIS C. CABAN, ASSOCIATE EXECUTIVE DIRECTOR, MIDWEST-NORTHEAST VOTER REGISTRATION EDUCATION PROJECT, INC.

Mr. **CABAN.** Thank you.

Mr. Chairman and distinguished members of the committee, let me thank you for this opportunity to address you today on the need to reauthorize and expand section 203 of the Voting Rights Act, better known as the minority language provisions of the act. These language provisions go to the heart of Latino and language minority citizen participation in the United States of America, the world's leading democracy.

My experience with section 203 is long and diverse. Holding both elective and appointive office in the early 1970's in New York placed me face to face with the voting process, many times actually assisting citizens who would lose their right to vote for one of two reasons: Either for not knowing their rights at the poll and being discouraged by election officials attempting to depress the Hispanic and/or the minority vote, or for not knowing enough English to defend their right to vote when challenged.

For the last 8 years I have been directly involved in nonpartisan political development work in minority and Hispanic communities in the Midwest and Northeast regions of the country. One of my principal responsibilities as associate director of the Midwest-Northeast Voter Registration Education Project is the conduct of election day exit polls during primaries, general and special elections. This responsibility has placed me at the polling sites in Illinois, Pennsylvania, New York, New Jersey, Connecticut, and Massachusetts, and has given me a clear and real sense of the problems confronted by our language minority citizens in trying to exercise a constitutionally guaranteed right. Elimination of the language provisions would effectively exclude hundreds of thousands, if not millions, of citizens from participating in what is defined as a participatory democracy.

As a U.S. citizen, born in Puerto Rico to Spanish-speaking parents, I came to New York City as a child and personally experienced the need for language assistance, as many a time I had to translate for family and friends. I believe, as the Federal courts have ruled, that if you are a U.S. citizen, educated in Spanish under a U.S. flag school, you have a right to Spanish language assistance so as to knowledgeably cast a ballot. I also believe, contrary to McCarthy-like monolingual zealots, that increasing voter participation by eliminating language barriers does not weaken democracy; it strengthens it. Many will tell you that there are plenty of non-English speakers who are more patriotic and love democracy more than many whose mastery of English would put William Buckley to shame.

The language provisions of the Voting Rights Act address the issue of access to the ballot box. The key word here is access. Unimpeded access to the ballot box is, in fact, the central and overriding issue in this argument. It is the issue for which many before us have died. Our history is replete with barriers to voting, and yet, there are those who will argue in this day and age that the absence of language assistance is not a barrier to participatory democracy but, rather, a form of encouragement for citizens to learn English. So, until I learn to read English well enough, I should not be concerned about a ballot resolution that may raise my taxes or may cut the number of science teachers in my child's school. Not providing citizens with language assistance seems very much like "justice delayed is justice denied."

Today, more than ever, there is a need to strengthen and expand the act, not abridge it. There are millions of new and soon to be citizens who will enter their golden years with limited English proficiency. Our Hispanic population grew 53 percent since 1980. There are 8 million more Hispanics in the United States today than there were in 1980. The Northeast alone grew by over 1 million Latinos. Well over half are of voting age, albeit not all U.S. citizens. Exceptionally rapid growth, coupled with the lack of citizenship of the recent immigrant Latino populations, artificially depress our registration and voting trends. Naturalization, however, has seen a marked increase for Latinos and the voting eligible population will increase dramatically over the next decade. This is all the more reason to extend section 203 of the act. Most of the Puerto Rican migrants and new Latino immigrants come with a dream of a better life. To them, electoral participation without language assistance could very well be a nightmare.

Spanish-speaking citizens have suffered from lack of enforcement of the language assistance provisions of the act and many jurisdictions with the greatest need for language assistance are not covered. Additionally, voter registrtion, a critically important element of the elections process, is the stage at which many local officials circumvent compliance with language assistance.

In New Jersey in recent elections, we have experienced an increasing reluctance to comply with the act in covered jurisdictions. In the cities of Paterson, Passaic, Jersey City, and Hoboken, Latino leaders must constantly be vigilant lest they face an election with little or no bilingual personnel at the polling sites. Instances abound where Spanish language elections material is unavailable at polling sites in covered jurisdictions. In a State with three-quarters of a million Latinos, elections officials employ non- or limited-Spanish speakers to translate material which often results in gross inaccuracies.

A critical area which must be changed is the principal use of counties to determine language assistance need. This feature results in both overlooking political jurisdictions smaller than counties, but with much need for language assistance and does not provide for targeting language assistance resources to areas of real need as a cost control measure. Consider Morris County in New Jersey, which is only 4.7 percent Hispanic. However, Dover Town, a municipality within the county, is 40.4 percent Hispanic. There are 109 municipalities in New Jersey alone with Hispanic populations under 10,000, but which represent over 5 percent of each of their total populations. Dover Town's Hispanic population numbers 6,101 and, therefore, does not meet the 10,000 figure which has been suggested as a threshold.

Although most of this population understands English, a majority would be hard pressed to understand the level of English used in ballot questions for which they should vote. Similar situation abound throughout the Northeast and Midwest United States. I would designate any political jurisdiction, as small as an election district or precinct, that has 5 percent Hispanic population and where citizens have indicated on their registration application their preference for Spanish language election information and materials.

Although numerous reports indicate that the cost of implementing the language provisions is not prohibitive by any stretch of the imagination, requiring a Spanish language preference checkoff box on the registration form will go a long way in reducing costs, since both the specific geographic areas of need and the amount of translated materials necessary can be determined up front.

In the States of Connecticut and Massachusetts, language assistance is denied at the most fundamental stage—at registration. These two States only permit registration by deputized registrars and several jurisdictions have a practice of refusing to deputize Latinos. If citizens who require language assistance cannot even register, then obviously they are not going to show up at the polls to verify the growing need for language assistance.

In conclusion, I wish to emphasize that bilingualism, especially in a world economy as we have today, is an asset to our competitiveness, not an impediment. By gosh, even the Japanese are playing and singing Salsa music today. Many Europeans are trilingual and most are bilingual. Our ability to compete internationally is going to rest on the multilinguistic and multicultural skills of our private and government ambassadors. Corporate America already understands that today.

The key theme in the argument over the language assistance provisions is access to the ballot box. Are we to continue with yet another scenario that effectively denies access? With only 45 percent of the United States eligible population voting in the November 1990 congressional elections, I dare say we have a long way to make participatory democracy a reality. We must go well beyond just providing language assistance.

Most of the areas in the Northeast and Midwest with serious language assistance needs today are not covered jurisdictions. Latinos live in closely knit, extended family modes in neighborhoods and a relatively small population can be targeted for language assistance at minimal costs.

Lastly, enforcement of the act is critical. No one would deny that over the last decade we have experienced a growing intolerance to racial and ethnic diversity in this country. The ugly head of racism, bias and discrimination crops up almost daily somewhere within our borders. Those who control the elections processes are not immune from these sicknesses. They can be the worst and most illusive enemies of democracy. Let's extend and enforce the act. Let's give Spanish speaking and other language minority citizens real access to their dreams.

Thank you, sir.

Mr. EDWARDS. Thank you very much, Mr. Caban.

[The prepared statement of Mr. Caban follows:]

TESTIMONY OF LUIS C. CABAN
ASSOCIATE EXECUTIVE DIRECTOR, MNVREP, INC.
BEFORE THE HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
ON THE REAUTHORIZATION AND EXTENSION OF THE
LANGUAGE PROVISIONS OF THE VOTING RIGHTS ACT
APRIL 2, 1992

Mr. Chairman. Distinguished members of the Committee. Let me thank you for this opportunity to address you today on the need to reauthorize and expand Section 203 of the Voting Rights Act, better known as the minority language provisions of the Act. These language provisions go to the heart of Latino and language minority citizen participation in the United States of America, the world's leading democracy.

My experience with Sec. 203 is long and diverse. Holding both elective and appointive office in the early 1970s in New York placed me face-to-face with the voting process, many times actually assisting citizens who would lose their right to vote for one of two reasons: either for not knowing their rights at the poll and being discouraged by elections officials attempting to depress the Hispanic and/or the minority vote; or, for not knowing enough English to defend their right to vote when challenged.

For the last eight years I have been directly involved in nonpartisan political development work in minority and Hispanic communities in the Midwest and Northeast regions of the country. One of my principal responsibilities as Associate Executive Director of the Midwest•Northeast Voter Registration Education Project is the conduct of election day exit polls during primaries, general and special elections. This responsibility has placed me at polling sites in Illinois, Pennsylvania, New York, New Jersey, Connecticut and Massachusetts, and has given me a clear and real sense of the problems confronted by our language minority citizens in trying to exercise a constitutionally guaranteed right. Elimination of the language provisions would effectively exclude hundreds of thousands, if not millions, of citizens from participating in what is defined as a participatory democracy.

As a United States citizen born in Puerto Rico to Spanish speaking parents, I came to New York City as a child and personally experienced the need for language assistance, as many a time I had to translate for family and friends. I believe, as the Federal courts have ruled, that if you are a U.S. citizen educated in Spanish under a U.S. flag school, you have a right to Spanish language assistance so as to knowledgeably cast a ballot. I also believe, contrary to MacCarthy-like monolingual zealots, that increasing voter participation by eliminating language barriers, does not weaken democracy, it strengthens it. Many will tell you that there are plenty of non-English speakers who are more patriotic and love democracy more than many whose mastery of English would put William Buckley to shame.

The language provisions of the Voting Rights Act address the issue of access to the ballot box. The key word here is access. Unimpeded access to the ballot box is, in fact, the central and overriding issue in this argument. It is the issue for which many before us have died. Our history is replete with barriers to voting. And yet, there are those who will argue, in this day and age, that the absence of language assistance is not a barrier to participatory democracy, but rather a form of encouragement for citizens to learn English. So, until I learn to read English well enough, I should not be concerned about a ballot resolution that may raise my taxes, or may cut the number of science teachers in my child's school. Not providing citizens with language assistance smells like that old cliché, "Justice delayed, is justice denied."

Today, more than ever, there is a need to strengthen and expand the Act, not abridge it. There are millions of new, and soon to be, citizens who will enter their "golden years" with limited English proficiency. Our Hispanic population grew 53% since 1980. There are 8 million more Hispanics in the United States today than there were in 1980. The Northeast alone grew by over 1,000,000 Latinos. Well over half are of voting age, albeit, not all U.S. citizens. Exceptionally rapid growth coupled with the lack of citizenship of the recent immigrant Latino populations artificially depress our registration and voting trends. Naturalization, however, has seen a marked increase for Latinos and the voting eligible population will increase dramatically over the next decade. This is all the more reason to extend Section 203 of the Act. Most of the Puerto Rican migrants and new Latino immigrants come with a dream of a better life. To them electoral participation without language assistance could very well be a nightmare.

Spanish speaking citizens have suffered from lack of enforcement of the language assistance provisions of the Act and many jurisdictions with the greatest need for language assistance are not covered. Additionally, voter registration, a critically important element of the elections process, is the stage at which many local officials circumvent compliance with language assistance.

In New Jersey in recent elections we have experienced an increasing reluctance to comply with the Act in covered jurisdictions. In the cities of Paterson, Passaic, Jersey City and Hoboken Latino leaders must constantly be vigilant lest they face an election with little or no bilingual personnel at the polling sites. Instances abound where Spanish language elections material is unavailable at polling sites in covered jurisdictions. In a state with three quarters of a million Latinos, elections officials employ non- or limited- Spanish speakers to translate material which often results in gross inaccuracies.

A critical area which must be changed is the principal use of counties to determine language assistance need. This feature results in both overlooking political jurisdictions smaller than counties, but with much need for language assistance, and does not provide for targeting language assistance resources to areas of real need as a cost control measure. Consider Morris County in New Jersey which is only 4.7% Hispanic. However, Dover Town, a municipality within the county, is 40.4% Hispanic. There are 109 municipalities in New Jersey alone with Hispanic populations under 10,000, but which represent over 5% of each of their total populations. Dover Town's Hispanic population numbers 6,101 and, therefore, does not meet the 10,000 figure which has been suggested as a threshold. Although most of this population understands English, a majority would be hard pressed to understand the level of English used in ballot questions for which they should vote. Similar situations abound throughout the Northeast and Midwest United States. I would designate any political jurisdiction, as small as an election district or precinct, that has 5% Hispanic population and where citizens have indicated on their voter registration application their preference for Spanish language election information and materials.

Although numerous reports indicate that the cost of implementing the language provisions is not prohibitive by any stretch of the imagination, requiring a Spanish language preference check-off box on the voter registration application will go a long way in reducing costs since both the specific geographic areas of need and the amount of translated materials necessary can be determined up front.

In the states of Connecticut and Massachusetts language assistance is denied at the most fundamental stage -- at registration. These two states only permit registration by deputized registrars and several jurisdictions have a practice of refusing to deputize Latinos. If citizens who require language assistance cannot even register, then obviously, they are not going to show up at the polls to verify the growing need for language assistance.

In conclusion, I wish to emphasize that bilingualism, especially in a world economy, is an asset to our competitiveness, not an impediment. By gosh, even the Japanese are playing and singing Salsa music. Many Europeans are trilingual and most are bilingual. Our ability to compete internationally is going to rest on the multilinguistic and multicultural skills of our private and government ambassadors. Corporate America already understands this.

The key theme in the argument over the language assistance provisions is access to the ballot box. Are we to continue with yet another scenario that effectively denies access? With only 45% of the U.S. eligible population voting in the November 1990 Congressional elections I would say we have a long way to go to make participatory democracy a reality. We must go well beyond providing language assistance.

Most of the areas in the Northeast and Midwest with serious language assistance needs today are not covered jurisdictions. Latinos live in closely knit extended family modes in neighborhoods and a relatively small population can be targeted for language assistance at minimal costs.

Lastly, enforcement of the Act is critical. No one would deny that over the last decade we have experienced a growing intolerance to racial and ethnic diversity in this country. The ugly head of racism, bias and discrimination crops up almost daily somewhere within our borders. Those who control the elections processes are not immune from these sicknesses. They can be the worst and most illusive enemies of democracy. Let's extend and enforce the Act. Let's give Spanish speaking and other language minority citizens real access to their dreams.

Mr. **Edwards**. The gentleman from Oregon, Mr. Kopetski.

Mr. **Kopetski**. Thank you, Mr. Chairman. I'm going to kind of admonish myself to be a little more reserved in today's hearing than I was the other day. I guess I sort of, for the committee record, want to explain myself a little bit.

I have a rich, diverse district, maybe not as diverse as San Francisco, but I have Hispanic people in my district in terms of large populations, and I also have a large group of Pentacostal Russians. These are people—I kept thinking about this hearing and this issue and some of the comments made by the "English firsters" the other day, about how speaking English is just as important as voting. That has sort of been resonating through my brain here these past few days.

I guess I will begin by focusing on the Russians, because these are people that literally walked out of Russia under Communist rule, came to this country and have established themselves in various parts of our country, including in the Williamette Valley of Oregon. They add so much to our culture in Oregon. They're very good farmers; they love and respect the land. Many of them don't speak any English, even today for some of them 20 years later. It's been a challenge actually to get them to interface with government even at the local level, because their history and heritage is to fear government, that government is something that is bad, government is something that's going to lock you up or harm you or, worse, end your life. What is interesting is that, of all the issues, the drug issue has forced them to come and ask for help from the Government because they see that drugs are getting to their youth and they have not been able to stop that on their own. So they are beginning to interface with government.

But I can tell you that they have a great amount of fear in doing this here in the United States, that those of us in the white society, that grew up in middle class households, we just take it for granted that you would go to the police and ask for help. So I hear all this stuff about how important English is, and it's just not a knowledge of reality of our newer Americans and even those Americans that are born and raised learning a different language.

I guess I need to—and these are constitutionally loving Americans today. You don't get any finer Americans, who will fight and die for the rights that now they have, after having to escape from communism. So I think that those kinds of feelings were coming out of me and I really didn't articulate it well in our last hearing.

My first question, could you respond to these comments as it relates to your community, in trying to get people drawn into our system of government and to use government to participate and voting as a way in which we draw them in?

Ms. **Lee**. First of all, I think the Chinese-American experience is very much similar. Most of the Chinese-American newcomers are from China, which is not very different from Russia. They came from a country where there was no such thing as democracy, so when they came here, the first thing they learn is, if something is not right, they have the right to speak up, whether it's the school trying to cut out afternoon programs for their children, or whether a health clinic is being closed.

It takes a long time. It's not a 1-year process. In fact, we're still going through that. When you go over to the voting process, it's completely different, because the second question we usually ask the people who are registering is which party would you like to sign up. They came from a one-party system and there is no section for you to select the party to represent you. There is no choice.

What we are also learning is that language is the most important way for them to participate. The first thing people usually say is "I do not speak the language; I do not have a right to see who is going to represent my city." What we are doing is we're trying to say that America is a country with a very diverse population, and whether you speak the language or not, the Constitution guarantees that, once you become a naturalized citizen, you have a right to decide how your life is going to be run.

Again, even in Oregon, we have people calling down to San Francisco for assistance. People would say why didn't they learn the language, but as we can clearly show, most of the people who came here are middle aged from China with no previous education. It is difficult enough for them to learn their first alphabets, let alone to understand all the ballot issues.

The second thing is they have to understand is reapportionment, different things that are so foreign to them. Until they've been here for many, many years, to really exercise their right, it's going to be difficult. But they take great pain to learn and to be assimilated.

Mr. KOPETSKI. My second question—and I think we're probably under the 5-minute rule—is to Mr. Hernandez. I have two counties that sit side by side. One has about 30,000 voters, so under the 5-percent rule, that means 1,500 voters is the threshold. Then in the next county, which is one of my larger counties, where our State capital is, has about 120,000 registered voters, or 6,000. So the addition that you're asking in this language is a threshold of 10,000.

Well, I've got two small counties and the people are all of the same community, in the sense that it's an artificial political line that was drawn that sort of divides the community. On the one hand, we can get to the 1,500, and it's the smaller county; on the other hand, the same community, 6,000, and it doesn't reach the 10,000. I think the 10,000 is too high.

Mr. HERNANDEZ. I think that speaks to the question that Mr. Caban raised in his testimony. Certainly there's a lot of ways to look at it. One is, is there a price tag on the right of a citizen to exercise his right, given that these citizens are taxpayers? Let me go back to that point.

Second, I think you're right. I think if we just used plain old common sense, common sense would dictate that if the intent of the legislation is to bring people into the process, then those kinds of artificial boundaries because it's convenient from an administrative point of view don't make common sense. So I agree with that, exploring points of the legislation that would allow us to drop to a different level, a different threshold, that won't significantly increase the cost against what you gain in people participating.

I really do think that here's a question that, at a time when we're witnessing the decline of civic culture in this country—it's not Hispanics who are in decline. It's the majority population who are dropping out, who are angry, who feel alienated from their own government. At a time when we're experiencing people dropping out in record numbers, the truth of the matter is that Hispanics have been positively responding to that opportunity to vote. So it makes sense not just for Hispanics, but it makes sense for the revitalization of American democracy.

I happen to believe that where you have democracy alive and fighting to be alive is in our community. We're not talking about being a separate nation. We're talking about bring us in and let us be part of the process.

I would also say, Congressman, that I think like you do, because we work in the field and I see people that I've talked to who have never voted in their lives, who take those first steps. A 70-year-old grandmother who lost one of her boys in World War II, and whose two grandsons are now in Desert Storm, has been a good citizen all of her life, paid her taxes, given all that she can give, and to see that person go into that voting booth for the first time makes me believe in this country.

I happen to believe, very honestly and very sincerely, that every time we do that we revitalize American democracy. If I have to compare this elderly woman, who doesn't speak English, who walked into that voting booth, to one who speaks English and doesn't vote, and ask which of the two are better citizens, which of the two have fulfilled their civic obligation and fulfilled their duty as citizens, it would be the Spanish-speaking person who is the better citizen, even though they don't speak English.

Mr. EDWARDS. The time of the gentleman has expired.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Thank you.

Mr. Hernandez, early on you likened denial of people's ability to vote, or right to vote, or facility to vote, with South Africa, where people are denied certain rights because of the color of their skin. There is a big difference, though. I would hope you recognize that you can't change the color of your skin but you can learn English.

Mr. HERNANDEZ. Well, the point I was making, Congressman, was that if the basic qualification for the rights of citizenship becomes how much English you know——

Mr. HYDE. No, it doesn't.

Mr. HERNANDEZ. That was the point I was making.

Mr. HYDE. Yes, but nobody says that.

Mr. HERNANDEZ. It essentially becomes that.

Mr. HYDE. It's just can you read the ballot, do you know who the candidates are, do you know if you're a Democrat or a Republican, can you read the proposition, and do you understand it. You don't have to be an English major or a Ph.D. or have a great vocabulary; just enough English to know what you're doing.

Mr. HERNANDEZ. You know, so many candidates from both parties now campaign in Spanish and on the Spanish-speaking media—both parties spend a lot of money now on the Spanish-speaking media—I think Spanish speakers know the issues. This is a private sector endeavor, not the Government's. We have a lot of Spanish-speaking newspapers. So in terms of understanding the issues, if that's really the question, whether or not a voter understands the issues and understands what's going on, I think there's enough information available to those folks who are interested in the process. I would say there are probably some Spanish-speaking voters right now who are more informed, better educated on the issues, than English speakers who are voting. I would be willing to say that.

Mr. HYDE. I'm sure you can find bright people in any language group who are smart and know—Asiatic people do extremely well in tests and things. I would hate to be in a classroom with a lot of them when the teacher marked on the curve. I'd be at the bottom.

You talked about the notion of paying taxes. People who live in this country and benefit from the police, the fire, all of the protections that the taxes buy, they are obliged to pay for them, as we all are. That doesn't have any necessary link to voting. One would like, when one pays for something, to have some say in how the money is spent and for what it's spent. But if you're not a citizen, if you don't bother to become a citizen, or if you're in the country illegally, or if you're too young to vote, or if you've been convicted of a felony, if you've lost your right to vote, you're still obliged to pay taxes. So there is no necessary link between the two.

Mr. HERNANDEZ. I think the point there, Congressman, that I was making was that if we make the argument along cost lines, I think there has to be an honest recognition that Hispanic taxpayers pay for some of the costs of services.

Mr. HYDE. Absolutely.

Mr. HERNANDEZ. In the same way that any other taxpayer would. That's the only point I was making there.

Mr. HYDE. And they volunteered for Desert Storm; nobody was drafted. Some lost their lives, tragically——

Mr. HERNANDEZ. And in World War II, yes.

Mr. HYDE. But what we're talking about is bilingual ballots and whether they assist people in voting and in being assimilated into the society——

Mr. KOPETSKI. Will the gentleman yield?

Mr. HYDE. Sure.

Mr. KOPETSKI. I do see a relationship between paying taxes and being able to vote, because when you go to the polls, one of the things you're voting on is how that money will be spent, whether it's a ballot measure for the community's police services or for the fire district or for—you know, in my district we have mosquito control districts and noxious weed control districts.

I come back to my Russian farmer friends, where they are deterred from voting on the allocation of their money. They have to pay taxes and they want to vote, but there is this deterrent from this because of the language issue.

Mr. HYDE. Well, sure. My point is that everybody has to pay taxes as the price of civilization, the price of living in a country that provides services that those taxes buy. But that's an obligation that everybody has.

Now, the right to vote has qualifications. You have to be of a certain age, you have to register, you have to not have been convicted of a felony, you have to be a citizen. So there are qualifications to voting but there aren't any qualifications to paying taxes. You pay taxes whether you're qualified or not.

Mr. KOPETSKI. Sometimes even if you're not a citizen.

Mr. HYDE. Well, yes, especially, because you're benefiting from the services that those taxes pay for. Sure. Why not? Why shouldn't you pay taxes, whether you're a citizen or not?

Mr. KOPETSKI. Well, my point is you can be a citizen and not get to direct where that tax money is going.

Mr. HYDE. Then you have to take certain other steps to qualify, to become a citizen.

Mr. KOPETSKI. But if you're a farmer out there, you know, you're busy. You want——

Mr. HYDE. You and I can talk later, but I would like to ask Mr. Hernandez—if you don't mind, Mike, I have a couple of questions.

Mr. Hernandez, where did you get your figure that there are currently over 5 million Hispanic voters?

Mr. HERNANDEZ. Based on projections off of the current population survey. If you compare 1980 Census data to 1990, you're mixing apples and oranges. 1980 was a Presidential election year. Any time you have a Presidential election year, the registration and turnout rate increases dramatically, and that's true ever since World War II. So if you compare 1990 data to 1980 data, there's going to be a decline across the board and the registration rate and the actual votes cast—you're talking about two different things.

If you project out what the natural increase has been since 1980, just over time, the natural increase, which is right now we're looking at about a 21-percent increase every 4 years in the number of Hispanics registering to vote, about 20 percent, then you project that to 1992—and we don't have the 1992; we're still in it—figures, then you're going to get close to 5 million.

Actually, that's a conservative estimate. When the current population survey report comes after the November election, it will be over 5 million. I just wanted to low ball it.

Mr. HYDE. The Census Bureau says that in November 1990, 4.5 million Hispanics were registered to vote, and 2.9 million voted.

Mr. HERNANDEZ. Yes. My point is, if you project out in Presidential elections, and you project out the natural rate of increase over this time, it would be over 5 million.

Mr. HYDE. A projection in other words. Sure. I understand. That's my question.

Now, you say that between 1980 and 1990, the rate of Hispanic citizens voting increased five times the rate of the rest of the Nation.

Mr. HERNANDEZ. Right.

Mr. HYDE. Now, according to the Census Bureau, in 1978, the percentage of white citizens of the total population is 48.8 percent, Hispanics 34.3 percent. That's 1978. In 1982, the white was 51.6 and Hispanic 37.1 In 1986, white 49 percent, Hispanic 36.4 percent. Then in 1990, white 49 percent, Hispanic 33.8 percent.

So it has gone down in the Hispanics from 1986 to 1990——

Mr. HERNANDEZ. Let me correct you on—well, let's make a distinction between—the percent of the eligible voting age population, the percent of the voting age population period, and percent of the registered voters who actually vote. There are three different numbers that you need to look at

If you apply the number—and I don't have what you have in front of you, Congressman, so I can't say. But let's just go through all three of them. If you say 18-year-old-plus, then you're including in there about 33 percent noncitizen population, who can't register and vote. The fact of the matter is, the noncitizen population over the last decade has increased dramatically within the Hispanic community.

If you're talking about the 18-year-old-plus citizen population, then you're going to get a different number.

Mr. HYDE. Sure.

Mr. HERNANDEZ. Now, if you look at the rate of increase, because we're a young population, our rate of increase every 4 years in the voting age citizen population is over 25 percent. In other words, every 4 years we increase the number eligible by 25 percent because there's just so many of us and we're so young and we're in that demographic belt.

Mr. HYDE. But whether they register is another matter.

Mr. HERNANDEZ. Wait. Let me finish, Congressman.

What I've just said earlier—and I don't know what it's going to take to make this any clearer—is that if you look at the actual number of people voting and registered—these are actual real people, not percentages—we've had a 21-percent increase in those same 4 years. So we've only had a 21-percent increase in the number of people registered and voting, but we've had a 25-percent increase in the number of people eligible. The good news is, we're still five times the rate in those 4 years of everybody else, because if you look at the same figures, it's only about 2 percent for——

Mr. HYDE. Well, you know, everybody's group increases, some more than others——

Mr. HERNANDEZ. But it's the rate of increase. That's exactly right. It's the rate of increase.

Mr. HYDE. But the Hispanic rate of citizens reported voting in 1990 was 33.8 percent; in 1986 it was 36.4 percent——

Mr. HERNANDEZ. Because there were fewer——

Mr. HYDE. And in 1982 it was 37. This is a percentage of those voting.

Mr. CABAN. Andy, can I interdict here a second?

Congressman Hyde, the figures that you're getting from the current population surveys, the registration and voting trends that comes out every 2 years, reports strictly the percentage of the 18-plus population. In terms of Hispanics, that is 18-plus, meaning 18-plus whether they are citizens or not. Obviously, as our population increases considerably, the percentage doesn't grow because the overall population grows much, much faster and greater. So if we have 20,000 people who are eligible today out of 100,000, and tomorrow, instead of 100,000 we have 500,000, then obviously, even though the number increases dramatically of those who register and vote, the percentage of it decreases.

Mr. HYDE. Mr. Caban, in November 1982, 2.2 million Hispanics voted. In November 1990, 2.9 million Hispanics voted. That's what the census shows. That's not an explosive increase in 10 years.

Mr. HERNANDEZ. Yes, but it's true. The fact of the matter is, in 1976, 2.5 million Hispanics were registered to vote. Now there is currently—let's take your figure, 4.5 million. I think that's pretty dramatic at a time when people are buying out—you've got to remember that there's 2 million more people registered to vote; there were 618,000 more votes cast from 1984 to 1988, at a time when the Nation as a whole is declining. We're bucking the trend.

Mr. HYDE. I don't think our population is declining.

Mr. HERNANDEZ. No, the number of people voting and the percent of people voting is declining in this country, in every election.

Mr. HYDE. Just one more comment to Mr. Caban. You mentioned in your statement "McCarthy-like monolingual zealots." I assume you're referring to official English proponents. The voters of 18 States currently have English language amendments on their books. The English language amendment here in Congress and the Language in Government Act each have over 100 cosponsors in the House.

Are you saying that anybody who believes strongly in national unity or national identity and supports the use of a common language is a "monolingual zealot?"

Mr. CABAN. No, Congressman. I'm referring to people who, in this day and age, refuse to accept the fact that other people may have a language that they feel more comfortable in and that they can use it better for their everyday life. That's what I'm referring to. I'm not referring to English-only and I'm not referring to any group in particular.

But I do come across, day in and day out, and especially at the polls, people who, when it comes to any language other than English, don't even want it near them. We see that day in and day out, and we see it at the workplace. There have been laws in this country because——

Mr. HYDE. That's like in Quebec. If you speak English in Quebec, if they think you're a Canadian, in a cab the driver gets mad at you and won't talk to you.

Mr. CABAN. That's correct, sir.

Mr. HYDE. That's a monolingual zealot, I would say.

All right. Thank you.

Mr. CABAN. It's not only English, Congressman. It's any language I'm referring to. If you happen to be a French speaker or a German speaker or any other language, and you feel that no one else should speak anything but your language, then I consider you a monolingual zealot.

Mr. HYDE. I'm sure there are such people. I haven't seen any but I'm sure there are. I've heard about them.

Thank you.

Mr. EDWARDS. Thanks to this panel. You're fine professionals and we are very grateful for your testimony.

Mr. CABAN. Thank you, Congressman.

Mr. EDWARDS. Will the next panel please come to the witness table, Vanessa Dixon and Eugene Hickok.

Ms. Dixon, you're going to be first. We welcome you.

Ms. DIXON. Thank you.

Mr. EDWARDS. Vanessa Dixon is a government relations officer with the organization named U.S. ENGLISH. Without objection, both of your statements will be made a part of the record. We will give you a hint at 5 or 6 minutes like we've done the others, that you should probably start to wind up so that we can have plenty of time for questions. Welcome, and please proceed.

STATEMENT OF VANESSA DIXON, GOVERNMENT RELATIONS OFFICER, U.S. ENGLISH, INC.

Ms. DIXON. Mr. Chairman and members of the subcommittee, thank you for the opportunity to present the views of U.S. ENGLISH, Inc., a nonprofit, multiethnic, nonpartisan membership organization with hundreds of thousands of members nationwide. We speak for those members in opposing H.R. 4313. We urge the subcommittee to look at other proposals to amend the foreign language voting materials provisions of the Voting Rights Act.

U.S. ENGLISH believes that quality, universality and consistency must drive the crafting of H.R. 4312. As written, and in spite of what many want us to believe, this bill does not expand the franchise in a manner that is equal, universal and consistent. It merely proposes, through an arbitrary numerical formula, the production of ballots in languages other than English.

U.S. ENGLISH supports legislation that would uniformly, consistently and equally promote the expanded and informed exercise of the franchise. Contrary to statements about U.S. ENGLISH by other parties lobbying for H.R. 4312, we do not oppose all legislative efforts to broaden the exercise of the franchise by citizens who do not speak English. To the contrary, we favor increased participation in one of the most profound privileges of citizenship—voting.

There are many methodologies to accomplish the intended goal. It is the job of Congress to craft legislation based on methods that work and, furthermore, that work without sacrificing equality and consistency for all citizens. That is, after all, the purpose of the Voting Rights Act.

U.S. ENGLISH opposes legislation that uses capricious, arbitrary formulas to determine which groups of persons have a particular set of legal protections for their rights—leaving other language minority groups without the same protections. By embracing such formulas, this legislation contradicts its own purpose of expanding voting rights.

Under H.R. 4312, some individuals and some groups would have special rights in some precincts. Rather than effecting a universal approach for guaranteeing franchise access equally to all individuals throughout the United States, we would have to contend with a set of spotty, disparate procedures based on arbitrary formulas.

The worst case scenario. There is the very real possibility, based on the sketchy data presented, that promotion of official ballots in a few select foreign languages may result in the worst of two worlds: One, no universal expansion of the franchise has been effected, and two, official status has been accorded to multiple foreign languages which sets the precedent for broad use of any and all languages for any and all functions of government.

The best case scenario. Other methodologies are likely to work better in expanding vote participation and do not set the dangerous precedent of legislating away the unifying, inclusive, and empowering role of English as the Nation's common language.

As an idea, consider the position taken by the U.S. Commission on Civil Rights regarding H.R. 6219, a bill to extend and expand the Voting Rights Act of 1975. In their submission to the hearings, the Commission staff noted that one way to increase access to the franchise was to provide translated printed sample ballots to voters and allow them to retain such sample ballots as they cast their votes. Not only would this practice be effective and efficient, it would mean that the official ballot would remain in English.

In Australia, an instructional placard is posted at voting precincts in all represented languages, offering translations and instructions to voters in all linguistic groups, while the official ballot is the same for all citizens throughout the country in Australia's common language.

At U.S. ENGLISH, we believe that our goals are consistent with the goals of others who seek to expand the exercise of the franchise among all Americans. We enter into this discussion in good faith, believing that the official language of government is and must remain English.

U.S. ENGLISH does not support the notion that all parts of the official voting process must be in languages other than English. The ballot itself must remain in English to ensure that English remains the language of government.

U.S. ENGLISH believes that the genuine concerns and goals of all parties, working honestly and earnestly, can be accommodated in legislation that does expand access to the voting process.

Thank you.

Mr. EDWARDS. Thank you very much, Ms. Dixon.

[Additional testimony from Ms. Dixon follows:]

ADDENDUM TO TESTIMONY OF APRIL 2
PRESENTED BY MS. VANESSA DIXON FOR
U.S.ENGLISH, INC.
ON THE PROPOSED EXTENSION OF THE VOTING RIGHTS ACT
H.R. 4312

Thank you for the opportunity to submit an addendum to expand on our written testimony and statements made during the question and answer period between members of the Subcommittee and Ms. Vanessa Dixon of U.S.ENGLISH, Inc.

Distinction between "voting assistance" and "bilingual ballots"

A clear distinction must be made between "voting assistance" and "ballots in foreign languages," otherwise referred to as "bilingual ballots." Proponents and supporters of H.R. 4312 do not make a distinction between the two.

"Voting assistance" is generally understood as help a voter receives in understanding the voting process, the logistics of casting a vote, and the content of the official ballot through a sample translated ballot. All voting assistance occurs before the ballot is cast.

Proponents and supporters of H.R. 4312 speak of bilingual ballots as if they are synonymous with "voting assistance." They use the term "bilingual ballot" interchangeably to mean "language assistance." So when an organization like U.S.ENGLISH opposes H.R. 4312, the charge is immediately made that the organization is against language assistance. We beg to differ. U.S.ENGLISH favors providing voting assistance materials, which includes language assistance, but opposes having the ballot printed in languages other than English. This is why: Casting a ballot is an official act and as such it must remain in English, the common language of the country. Otherwise, all translated versions of the ballot then become official, making all languages used official languages of government. This is clearly a step towards the establishment of a multilingual government in the United States.

U.S.ENGLISH's position is clear: We do not support ballots in languages other than English. Casting the vote is an official act of government and as such the ballot should remain in English.

H.R. 4312 and multilingual government

U.S.ENGLISH opposes H.R. 4312 because it provides a precedent for the establishment of multilingual government. Such governments often produce instability by fomenting divisiveness along linguistic and ethnic lines. Multilingual governments also raise legal problems. One such problem is foreign language ballots. When confronted with many linguistic versions, how do we decide which ballot is the official one, that is, which one carries the weight of the law? **H.R. 4312 does not address that issue.**

10,000 benchmark: arbitrary and potentially unconstitutional

U.S.ENGLISH affirms its belief that the 10,000 threshold is arbitrary. No one knows how many people will actually be affected by extension of Section 203 of the Voting Rights Act. As Mr. Esteban Lizardo of MALDEF recognized during the hearing: "a definitive list of counties covered by the 10,000 threshold will not be available until the Bureau of Census tabulates the long census form."

U.S.ENGLISH opposes any and all benchmarks for two reasons: First, there exists no reason to establish a numerical benchmark. In fact, a numerical benchmark is contradictory to any attempt to expand the franchise equally to all individuals. All individuals should receive voting assistance materials if needed, regardless of whether or not that individual lives in a county made up of 9,999 other members of the same language minority group. Therefore, we call into question the claim that H.R. 4312 helps extend the franchise equally to all.

Second, a numerical benchmark which does not give all language minority groups equal access to voting assistance materials seems to challenge the 14th Amendment to the Constitution, which grants everyone equal protection under the law. Consider that the proposed legislation, H.R. 4312, may be unconstitutional.

H.R. 4312 fails to extend the privilege of receiving voting assistance materials equally. It does so for only a few select groups. The provision of equal protection is not, and must not be made into, a numbers issue. The argument that specific groups and arbitrary numbers should dictate legislation goes against the premise of the 14th Amendment. H.R. 4312 does not expand the franchise to all individuals equally (including Rep. Kopetski's Russian potato farming constituents).

H.R. 4312: a discriminatory measure

U.S.ENGLISH opposes H.R. 4312 because it is a formula for discrimination. Proponents of the bill claim that it will remove barriers. However, if passed, it would only expand the franchise and remove barriers for a few select groups. H.R. 4312 discriminates against people not belonging to those select groups. Furthermore, in many instances, even members of those select groups will find themselves discriminated against if they live in a multi-ethnic voting jurisdiction where there is not the mandatory number of speakers of their language. Thus, the intrinsic message of H.R. 4312 is that you must live in proximity to those who speak your native language in order to benefit from the assistance under the provisions of H.R. 4312.

We all know that today every individual who is eligible to vote is allowed to vote in this country. We also know that many language minority groups have been and continue to be discriminated against. The question we would like Rep. Edwards to address is why H.R. 4312 does not extend the same voting assistance privilege to French speakers in Maine, New Hampshire and Louisiana, or Haitians in Miami, Florida.

We submit that having the ballot in one language, English, will not discourage people from exercising their franchise. What will discourage many people in this country is for them to know that they are not afforded the same voting assistance accommodations because they either do not speak one of the four chosen languages provided for under H.R. 4312 or because they chose to live in an integrated neighborhood, a neighborhood without the mandatory 10,000 person benchmark.

Mandating voting assistance materials

The subject of voting assistance materials is best addressed by local municipalities. U.S.ENGLISH does not agree with the suggestion that this system be federally mandated. This is why: By instituting a federal mandate, counties that need not print foreign language voting assistance materials would be required to do so under the law, regardless of whether they need them or not. As we have indicated in our testimony, this assistance must be provided based on need, regardless of what native language a voter speaks (assuming s/he lacks English proficiency) or where that individual lives.

Importance of learning English

Rep. Kopetski agrees with U.S.ENGLISH that presently an official policy regarding English literacy does not exist. As he stated during the first day of testimony of the Voting Rights Act hearings:"...education is wonderful, but it's stressed, and it's not an entitlement. There's no entitlement to the right to speak, to learn English in the United States. So there are some problems."

Yes, there are problems. One of them is that unless there is an official recognition of the importance of learning English in the United States, no official obligation exists to teach people English. Another problem is that any attempt to make multilingual government documents official, i.e. through ballots in languages other than English, severely hurts any common sense efforts to unite our uniquely diverse country under a common language.

Expanding the franchise

U.S.ENGLISH believes that the way to expand the franchise is by delivering assistance and providing services equally to all affected groups while, at the same time, generating opportunities for limited English proficient voters to learn English. This is a sound, beneficial, and fair language policy.

Mr. EDWARDS. Dr. Eurgene Hickok is a member of the department of political science of Dickinson College, and has written articles and books on the subjects of the Bill of Rights and Congress and its role in constitutional interpretation. Dr. Hickok, we welcome you. You may proceed.

STATEMENT OF DR. EUGENE W. HICKOK, JR., DEPARTMENT OF POLITICAL SCIENCE, DICKINSON COLLEGE

Dr. HICKOK. Thank you, Mr. Chairman, and thank you to the members of the committee for inviting me to submit testimony regarding the extension of the Voting Rights Act language assistance amendments.

Let me point out at the start that I come here not as an advocate for English first or for bilingual ballots. I am more a student of the Constitution and of Congress and that's what leads me to offer the following comments.

The question that confronts Congress is deceptively simple, it seems to me: Should section 203 of the Voting Rights Act be extended another 15 years. I say that the issue is deceptively simple because, in my opinion, there is much more at stake than what immediately meets the eye. Congress should only act to extend section 203 of the Voting Rights Act after it faces up to the fact that the Voting Rights Act itself, including section 203, represents a serious challenge to the integrity of constitutional government, primarily because the purpose of the act has undergone a real transformation since it was first introduced in 1965.

Originally, the Voting Rights Act was enacted in an attempt to end racial discrimination in voting in the South. It's purpose was to make real the promise of the 15th amendment to the Constitution. As it has been extended and amended, however, over the years, the Voting Rights Act is aimed not just at ending illegal discrimination but at eradicating something called "vote dilution" and moving toward a system of "roughly equal representation." Moreover, what was once considered a temporary remedy to end voting discrimination has become a permanent fixture in much of the Nation, in existence in some places for more than a generation, and in some places where voter discrimination has never even been alleged.

Any debate over the wisdom of extending section 203 of the Voting Rights Act should consider the wider implications of that section and of that act for representation under our Federal Constitution.

The framers of the original Voting Rights Act felt that literacy tests and a low turnout among black voters in much of the South provided evidence enough that blacks were being discriminated against with regard to suffrage. The purpose of the Voting Rights Act then was to make good the promise of the 15th amendment. Here was Congress taking affirmative steps under its authority according to section 2 of the 15th amendment. As one student of the act has written, "What the Voting Rights Act accomplished—black enfranchisement—was precisely what it aimed to do."

It is important to remember that the act itself was understood by those who voted on it in Congress to be a temporary intrusion upon what has always been considered an area of governmental activity left primarily to State and local authority. Indeed, at the time, 10 years seemed an unacceptably long time to permit such extraordinary Federal control of much of the South over matters of suffrage. But the level of voter discrimination, I would submit, warranted such a radical act on the part of the Congress. The Supreme Court of the United States agreed in 1966, but the dissent in that case merits some attention.

Justice Black said of the Voting Rights Act in that case, that it represented a serious threat to federalism, and the supposed temporary nature of the threat did not, in his opinion, lessen the severity of the threat. For Justice Black, if federalism meant anything, it meant that States have the power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg Federal authorities to approve them.

Originally, the Voting Rights Act aimed at ending discrimination and ensuring ballot access. However, in 1969, the Supreme Court read substantive new power into the act. The Court found that ballot access is only part of the concern; the weight of a vote matters as well. In other words, the Court reasoned, in part due to its earlier reapportionment cases, that a 14th amendment right to protection from vote dilution was contained in the Voting Rights Act, an act which rested on the 15th amendment. The Supreme Court, in other words, through a number of important and, at the time, very controversial opinions—and they were, if you look back at the record, very controversial, at least in this Chamber—the Court blurred the distinction that exists between access to the ballot and the nature of representation in a republic. After 1969, the concern became ensuring an end to "vote dilution" and seeking equal representation. Subsequent amendments and extensions to the Voting Rights Act have embraced this concern for votes that count and equal representation.

A serious scrutiny of the Court's representation jurisprudence suggests that the majority on the Court invented much of its understanding of representation while invading the sovereignty of the States. There is little in the writings of those who framed the Constitution that suggests, for example, that representation can be reduced to the mathematical formulation of one man, one vote. For the framers, representation was a subtle and sophisticated idea that centered upon the way individuals elected to public office go about advancing the interests of those who elected them.

It is virtually impossible, I submit, to ensure equality of representation. The framers understood this. The majority of the Court, at least in the 1960's at that time, felt that by guaranteeing one man, one vote, and seeking ways to end vote dilution, they were guaranteeing equality of representation.

The fact of the matter is, the framers of the Constitution did not seek to ensure equal representation because they understood such a thing could not be ensured. They established a system of election and reelections so that citizens might be able to seek better representation, if necessary, through the competition at the ballot box. By opening access to the ballot with institutional arrangements of elections and reelections, representative government could be served better.

Not only did the framers eschew a concern with equal representation, they understood that representation in a republic might indeed include a concern for things other than people. The existence of the U.S. Senate provides evidence enough of that.

As the transformation of the Voting Rights Act continued during the seventies, so with it occurred a transformation in our understanding of representation in this country. In 1969, the Court held that literacy tests administered in Southern jurisdictions were inherently discriminatory. This was an important decision. For years, the provisions of the Voting Rights Act had recognized the distinction between voting practices, such as literacy tests, aimed at getting around the guarantees of the 15th amendment, and legitimate actions by State and local authorities to set standards for voting. In 1969, for much of the Nation, that distinction was erased. Suddenly, violations of the 15th amendment could be determined solely through statistics; no finding of actual intent to discriminate was needed. The Court, in effect, placed authority to govern local electoral affairs in the hands of the Federal Government.

By 1970, jurisdictions outside the South, which only a few years earlier had not been covered by the provisions of the act, came under the act. Literacy tests, after all, discriminate against those who have not benefited from adequate educational opportunities, as well as those who might be of some ethnic or language minority group and, therefore, it was argued, they violate the 14th amendment.

It is, again, an important argument. The issue once was literacy tests aimed at disenfranchising Southern blacks, now it was eradicating tests which might stand in the way of increasing voter participation. I might comment, by the way, that at the time that this came out in this body, Representative Conyers, who is not with us today, was very much concerned that literacy tests would no longer be allowed in much of the country. He felt that was an important aspect of local control over electoral affairs.

In 1975, with the addition of section 203 to the Voting Rights Act, Congress chose to collapse that distinction. In my opinion, the issue that confronts Congress is how long it will continue to play havoc with the Constitution and representative government.

Now, let me be completely frank with the members of the committee. Renewal of section 203 of the Voting Rights Act, in my opinion, hardly represents a serious threat to the Constitution. I think we all recognize that. Indeed, I think it is fair to say—and this is my opinion—that section 203 is perhaps the least troublesome section of this very, very important act. But I think it represents a symptom of a larger problem.

I submit that there is all the difference in the world between ending discrimination in ballot access and actively seeking to increase representation for groups in society. I submit that there is a difference between legislation aimed at ensuring qualified citizens are not denied the right to vote, and legislation aimed at ensuring citizens do vote. Where citizens have been denied or it has been alleged that citizens have been denied the right to vote, the Congress must continue to seek to right that wrong. That is what the 15th amendment means. But the 15th amendment does not authorize Congress or the courts, or any administration, to set forth policies aimed at encouraging political participation. That has always been the obligation of State and local authorities, political parties, and active citizens. The 14th amendment does not assert that individuals or groups in society have some constitutional right to equal representation.

In closing, let me reiterate. Nothing, in my opinion, is more important than ending invidious discrimination in this country, whether it be in voting, in housing, employment or education. The Constitution makes that clear. the principle of equality, first articulated in the Declaration of Independence, and later made concrete in the language of the Constitution, demands that this Nation continue to seek to end practices that stand in the way of the principle of equality.

Section 203 of the Voting Rights Act may be the least offensive of the provisions of the act, but I do feel it is a symptom of a greater disease that Congress would do well to seek to remedy.

Thank you.

Mr. EDWARDS. Thank you very much, Dr. Hickok.

[The prepared statement of Dr. Hickok follows:]

TESTIMONY OF EUGENE W. HICKOK, JR.
BEFORE
THE JUDICIARY COMMITTEE OF THE U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

APRIL 2, 1992

Thank you Mr. Chairman.

I want to thank the members of the committee for inviting me to submit testimony regarding the extension of the Voting Rights Act Language Assistance Amendments.

The question that confronts the Congress is deceptively simple: Should section 203 of the Voting Rights Act be extended another fifteen years? According to section 203, added to the 1965 Voting Rights Act in 1975, and extended with amendments in 1982, counties covered by the provisions of the Act must provide all information and materials relating to the electoral process in the language of the minority group applicable to the locality as well as in English. The Act recognizes as "language minorities" persons who are "American Indians, Asian Americans, Alaskan Natives or of Spanish heritage."

Originally, political subdivisions in which more than 5% of the citizens of voting age were members of a language minority, and the illiteracy rate of these individuals was higher than the national illiteracy rate were to be subject to the provisions of section 203. In 1982, the Act was amended to reflect information made available by changes in the 1980 census making it possible to determine, with considerable accuracy, the language ability of citizens. Congress therefore amended section 203, directing the inclusion of only those minority language citizens "who do not speak or understand English adequately enough to participate in the electoral process."

According to the U.S. Department of Justice, "some 197 jurisdictions in 20 states are covered by section 203." However, the expiration of section 203 would not lift the minority language requirements from all of these jurisdictions because language assistance is also provided to many of them through section 4 of the Voting Rights Act. According to the Department of Justice, 1980 census data suggests some "69 counties would no longer have to provide language assistance that is now required" should section 203 of the Voting Rights Act expire this summer.

I say that the issue before Congress is deceptively simple because it is my opinion that there is much more at issue here than immediately meets the eye. Congress should only act to extend section 203 of the Voting Rights Act after it faces up to the fact that the Voting Rights Act, including section 203, represents a serious challenge to the integrity of constitutional government, primarily because the purpose of the Act has undergone a transformation since it was first introduced in 1965.

Originally, the Voting Rights Act was enacted in an attempt to end racial discrimination in voting in the South. Its purpose was to make real the promise of the Fifteenth Amendment to the Constitution. As it has been extended and amended, however, the Voting Rights Act is aimed not at ending illegal discrimination but at eradicating "vote dilution" and moving toward a system of "roughly equal representation." Moreover, what was once considered a temporary remedy to end voting discrimination has become a permanent fixture in much of the nation, in existence in some places for more than twenty-five years, and in some places where voter discrimination has never been alleged.

Any debate over the wisdom of extending section 203 of the Voting Rights Act must consider the wider implications of that section and of the Act in general for representation under our federal Constitution.

The framers of the original Voting Rights Act felt that literacy tests and a low turnout among black voters in much of the South provided evidence enough that blacks were being discriminated against with regard to suffrage. The provisions of the Act were applicable to those jurisdictions in which the total voter registration in the presidential election of 1964 fell below 50% of those eligible and in which a literacy tests was employed for the purposes of registering voters. The purpose of the Voting Rights Act was to make good the promise of the Fifteenth Amendment. Here was Congress taking affirmative steps under its authority according to section 2 of the Fifteenth Amendment. As one student of the Act has written, "What the

Voting Rights Act accomplished -- black enfranchisement -- was precisely what it aimed to do."

It is important to remember that the Act itself was understood by those who voted on it in Congress to be a temporary intrusion upon what has always been considered an area of governmental activity left primarily to state and local authority. Indeed, at the time, "ten years seemed an unacceptably long time to permit such extraordinary federal control of much of the South over matters of suffrage." But the level of voter discrimination, I would submit, warranted such a radical act on the part of the Congress. The Supreme Court of the United States agreed in 1966, but Justice Black's dissent in South Carolina v. Katzenbach merits serious attention.

According to Justice Black, the Voting Rights Act represented a serious threat to federalism, and the supposed temporary nature of that threat did not, in his opinion, lessen its severity. For Justice Black, if federalism meant anything, it meant "states have the power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them."

Some critics, such as the writer of an editorial that appeared in the Wall Street Journal in March of 1965, were more severe in their condemnation of the Act: "To play with complicated formulas, to measure justice by percentages, and to aim punitive laws at some States, not only violates both the spirit and letter of the Constitution, but buries the real moral question in sophistry."

Originally, the Voting Rights Act aimed at ending discrimination and ensuring ballot access. However, in 1969, the Supreme Court read substantive new power into the Act. In Allen v. Board of Elections, the Court found that ballot access is only part of the concern -- the weight of a vote matters as well. In other words, the Court reasoned, in part due to its earlier reapportionment decisions that introduced the concept of "one man, one vote," that a Fourteenth Amendment right to protection from vote dilution was contained in the Voting Rights Act, an act which rested in the Fifteenth Amendment. As one perceptive scholar has put it, the Court found a "right to a vote that counts."

The Supreme Court, in other words, through a number of important and, at the time, very controversial opinions, blurred the distinction that exists between access to the ballot and the nature of representation in a republic. After 1969, the concern became ensuring an end to "vote dilution" and seeking to ensure "equal representation."

Subsequent amendments and extensions to the Voting Rights Act have embraced this concern for votes that count and equal representation.

A serious scrutiny of the Court's representation jurisprudence suggests that the majority invented much of its understanding of representation while invading the sovereignty of the states. There is little in the writings of those who framed the Constitution that suggests, for example, that representation can be reduced to the mathematical formulation of "one man, one vote." For the Framers, representation was a subtle and sophisticated idea that centered upon the way individuals elected to public office go about advancing the interests of those who elected them.

It is virtually impossible to ensure equality of representation. The Framers understood this. Apparently the Supreme Court of the sixties did not. The majority, at that time, felt that by guaranteeing "one man, one vote" and seeking ways to end "vote dilution" they were guaranteeing equality of representation. But there is no necessary relationship between access to the ballot and the character of representation. The character of representation is determined not by who votes but by who is elected.

The Framers of the Constitution did not seek to ensure equal representation because they understood such a thing could not be ensured. They therefore established a system of elections and re-elections so that citizens might be able to seek better representation if necessary -- to elect better individuals than they had in the past; to make their representation in the legislature "more equal" or perhaps even exceed representation from other districts. It was by combining open access to the ballot with institutional arrangements of elections and re-elections that representative government could be ensured.

Not only did the Framers eschew a concern with equal representation, they understood that representation in a republic might indeed include a concern for things other than people. While the rhetoric of the Court's assertion that legislators represent "people, not trees or acres" might be pleasing, it is simple-minded. Legislators represent interests. And the Framers understood that it might indeed be the case that some interests might be given preference over other interests. The existence of the United States Senate provides evidence enough of that.

As the transformation of the Voting Rights Act continued during the seventies, so with it occurred a transformation in our understanding of representation in the American republic. In 1969, the Court held that literacy tests administered in Southern states and jurisdictions were inherently discriminatory. This was an important decision. For years the provisions of the Voting Rights Act had recognized the distinction between voting practices, such as a literacy test, aimed at getting around the guarantees of the Fifteenth Amendment, and legitimate actions by state and local authorities to set standards for voting. In 1969, for much of the nation, that distinction was erased. Suddenly, violations of the Fifteenth Amendment could be determined solely through statistics; no finding of actual intent to discriminate was needed. The Court in effect placed authority to govern local electoral affairs in the hands of the federal government.

By 1970, jurisdictions outside the South which only a few years earlier were not covered by the provisions of the Voting

Rights Act came under the Act. With that, arguments for a national suspension of literacy tests mounted. Literacy tests, after all, discriminate against those who have not benefitted from adequate educational opportunities, as well as those who might be of some ethnic or language minority group, and therefore they violate Fourteenth Amendment equal protection provisions, it was argued. It is, again, an important argument: The issue once was literacy tests aimed at disenfranchising Southern blacks, now it was eradicating tests which might stand in the way of increasing voter participation among individuals who have not participated -- not because they have been the victims of discrimination, but because the Congress and the Courts read the Fourteenth Amendment as an affirmative authority to promote equality in votes, not just an end to discrimination. As one scholar argues: "To blur the difference between protection for minorities in localities with well-documented histories of blatant Fifteenth Amendment violations, on the one hand, and protection where the barriers to political equality were either linguistic or socioeconomic, on the other hand, was to destroy the clear lines and logical construction of the Act."

In 1975, with the addition of section 203 to the Voting Rights Act, Congress consciously chose to collapse that very important distinction.

In my opinion, the issue that confronts the Congress of the United States today is how long it will continue to play havoc with the Constitution and representative government. The facts are relatively straightforward. As early as 1975, when section 203 was added to the Act, the evidence of conscience and consistent disenfranchisement of "language minorities" has not been present. However, it is also true that increased access to the ballot for these groups, as well as blacks, has not resulted in the sorts of increases in the number of minority office holders one might anticipate when groups long outside the electoral process participate in that process. Congress has reasoned, and the current administration agrees, that this means that the vote of these groups is "diluted" and that efforts must continue to promote electoral results that place more minority individuals in office.

Let me be completely frank with the members of the Committee: Renewal of section 203 hardly represents a serious threat to the Constitution. I think we all recognize that. Indeed, I think it is fair to say that section 203 is perhaps the least troublesome section of the Act. But it still represents a symptom of a larger problem.

I submit there is all the difference in the world between ending discrimination in ballot access and actively seeking to increase representation for groups in society. I submit that there is a difference between legislation aimed at ensuring qualified citizens are not denied the right to vote, and legislation aimed at ensuring citizens do vote. Where citizens have been denied or it has been alleged that citizens have been denied the right to vote, the Congress must continue to seek to right that wrong. That is what the Fifteenth Amendment means. But the Fifteenth Amendment does not authorize Congress or the Courts or the Administration to set forth policies aimed at encouraging political participation. And the Fourteenth Amendment does not assert that individuals or groups in society have some constitutional right to equal representation.

Permit me to offer the argument that the logic of section 203 of the Voting Rights Act suggests to me that extraordinary efforts should be made by Congress to expand the coverage of the Voting Rights Act. If the members of the Congress truly feel that "language minorities" must be protected -- that those individuals who cannot comprehend the language of a ballot need to be provided assistance so that they may exercise their vote with greater knowledge and care -- then the Voting Rights Act should be expanded dramatically so that the federal government ensures that there is assistance available wherever any individual encounters trouble reading the ballot.

I doubt this would meet with the approval of the majority of members of this body. Nor should it. Yet the logic is the same. It is only because "illiteracy" is tied to some ethnic or racial group -- regardless of whether or not there exists a history of willful discrimination against that group -- that Congress feels compelled to continue to thrust forward the hand of the federal government in the electoral practices of local jurisdictions.

Nothing, in my opinion, is more important than ending invidious discrimination in this country. The Constitution makes that clear. The principle of equality, first articulated in this great land in the Declaration of Independence and later made concrete in the language of the Constitution, demands that this nation continue to seek to end practices that stand in the way of that principle. That was the goal of the Voting Rights Act originally -- ending practices that, by design, stand in the way of equal access to the vote. But the Voting Rights Act that this Congress is considering seeks something altogether different from ensuring equal access. It is an act aimed at ensuring certain results. The kindest reading I can give of the contemporary approach to the Voting Rights Act is that it reflects the sincere sense of Congress that access, by definition should lead to electoral results, and that when those results are absent it must be assumed that equal access is lacking. My more realistic reading is that Congress is responding to those groups who have long been able to harness the power of this institution. The modern Voting Rights Act is more the product of interest group politics than members of Congress seeking to take the Constitution seriously.

Section 203 of the Voting Rights Act may be the least offensive of the provisions of the Act. But it is symptom of a greater disease that Congress would do well to seek to remedy.

Mr. EDWARDS. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Ms. Dixon, I want to welcome you to this hearing. I think language is very important, and the language we use in our testimony and in these committees is instructive of our beliefs and feelings. I see in your testimony such terms as "capricious, arbitrary, spotty, disparate" procedures based on arbitrary formulas in talking about this threshold issue. I'm curious to get an understanding of why you say that.

I mean, I'm new to the Congress and I'm trying to figure out things here, but I hear a lot of debate and discussion over whether it should be 10,000 or 1,000, should it be 5 percent, should there be some other criteria—an Indian nation, for example, Hispanic community.

Why do you say this is all arbitrary and capricious when it sounds like a lot of debate and discussion is going on?

Ms. DIXON. We say that it's arbitrary and capricious because there does not seem to be any evidence to substantiate why that particular number was chosen. I was not here when Congressman Serrano spoke yesterday, but someone asked him how did he come up with that figure and he said "we needed a target." That's not enough of a reason to specify a very particular number that should receive a special voting privilege.

Also, the capriciousness of the sort of inherent discrimination in selecting out a few chosen language minorities at the expense of the many others in this country. There are approximately 150 different language groups represented here, and "language minority" is defined in the bill for five very specific groups. So it's for that reason.

Mr. KOPETSKI. Well, that's instructive.

So you're not saying we just pulled the number out of the air?

Ms. DIXON. That's what it seems like, yes.

Mr. KOPETSKI. Oh, that's what it seems like to you.

Ms. DIXON. Yes, in the absence of any reasoning to substantiate why the number was chosen. Were there studies? What was the specific logic behind it? So it does seem like a number chosen out of the air. It just seemed like the best number to choose, and that's not a good enough reason to propose a benchmark, an American benchmark.

Mr. KOPETSKI. Let me ask you this. I have to get an understanding of how you view the English language.

If one member was saying it should be 7 percent and another member was saying 3 percent, and they compromised at 5 percent, would you consider that arbitrary and capricious?

Ms. DIXON. If it were based on some specific reasoning—I understand that——

Mr. KOPETSKI. No, no.

Ms. DIXON. It's not a yes or no answer. I understand——

Mr. KOPETSKI. OK. Well, let's move on then.

You use a term here that some individuals and some groups would have "special rights" in some precincts. We have a hate campaign going on back home and they use these terms "special rights," that we don't want anybody to have special rights in our society. So I'm going to hope and allow you to respond to this, because I just know that you wouldn't be using what is a term of art out in Oregon for hate. I know you wouldn't mean that in that context and——

Ms. DIXON. You're absolutely right. I would not.

Mr. KOPETSKI [continuing]. And I want to make sure that you clarify that.

Ms. DIXON. I would be happy to.

When I say "special rights," I'm referring to rights that should be entitled to a large group of people. As Congresswoman Mink said yesterday, the Voting Rights Improvement Act helps to ensure that all citizens, no matter what their native language, are able to exercise this right.

That is not what is happening with H.R. 4312. "Special" refers to the fact that a large number of language minorities are being disincluded in the provisions, and this very special privilege is being conferred to a select few. That is what I mean by special, that it should be granted to everyone. If it's going to be granted, then rightfully it should be granted to everyone who applies, not to a few.

Mr. KOPETSKI. So you use the term "privilege." Should we change your testimony to say special privilege, because we're really not talking about a right here; we're talking about a privilege. Is that a better term?

Ms. DIXON. Voting is a right. I'm not sure what you're referring to.

Mr. KOPETSKI. Yes, but whether you get the ballot in English or Chinese or Spanish, that is a privilege that we, the Congress, establish.

Ms. DIXON. So you want some clarification on the difference between the word "right" versus "privilege?"

Mr. KOPETSKI. Yes.

Ms. DIXON. Voting is a right.

Mr. KOPETSKI. I know that, but that's not what I was talking about. I'm talking about whether you get that ballot in English or Chinese——

Ms. DIXON. Whether that is a privilege or not?

Mr. KOPETSKI. Yes.

Ms. DIXON. I would have to give you my personal opinion. I don't know the organizational opinion on a matter like that.

As an individual, I would consider getting a ballot in my own language, my own native language, to be a privilege.

Mr. KOPETSKI. A privilege. OK, good.

I don't know how we're doing on time, so maybe I should just stop here for now and wait for the next round.

Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Professor Hickok, do you feel that printing the ballot in the English language is, per se, discriminatory?

Dr. HICKOK. No, I don't.

Mr. HYDE. What evidence exists that there is a wrong to be remedied here? All the figures I've seen do not indicate a statistical basis for what we're doing. Do you know of any statistical basis?

Dr. HICKOK. Well, I've looked at the numbers from the various sources that I guess the members of the committee have looked at, and I can't say that I digested them all, nor could I argue that I have a comprehensive knowledge of them.

I can argue that, for me, discrimination is a matter of intent. In other words, if you use the language of the ballot, or if you use a test to be allowed to vote, with the intent of attempting to limit accessibility to the ballot, for any reason—other than, I guess, what is understood in this country to be appropriate, age—then that seems to me to be discrimination. But to argue that, by definition, the language of a ballot, which is the same everywhere, is intended to limit access to certain individuals because they don't speak or read that language, that, to me, is not discrimination.

Mr. HYDE. Do we have to find evidence of discrimination as a condition precedent to enacting or extending section 203?

Dr. HICKOK. I guess I have mixed responses to that. In my opinion, yes. In the Court's opinion, I think the result is somewhat mixed. The Court, over the years, has tended to move toward a notion that where originally it was intentional discrimination, intent to discriminate, which was the criterion, in more recent years it has been the effect test. As we all know, that's where the Court has moved more recently. I would submit that's part of the problem with the Court, and part of the problem that this Congress would redress.

I think discrimination is an active intent on the part of someone to hurt someone else, and you can't measure that solely by the results of a campaign or a vote.

Mr. HYDE. Ms. Dixon, your point is that why in the world do we only settle on four specific groups to have the benefit of bilingual ballots when there are all kinds of languages, and if the purpose of the act now is expanded to encourage people to vote—it's no longer to discourage discrimination but to encourage people to vote—why are we limiting it just to these groups? Do you have an answer to that?

Ms. DIXON. I don't have an answer. I can't speak for the proponents of the legislation in terms of——

Mr. HYDE. Maybe the lobbyists for those groups are more effective, and the poor Lithuanians and Albanians are neither numerous in terms of political strength or have lobbyists. Could that be it?

Ms. DIXON. That very well could be it. That seems to be a definite lesson in the political life of this country, that if you do not vocalize on behalf of what you want, what you think you should have, you will not get it.

Mr. HYDE. The "squeaky wheel" principle.

Ms. DIXON. Exactly.

Mr. HYDE. Professor Hickok, can you think of any reason why we are only including the four groups—is it four or five?

Dr. HICKOK. Yes. As I mentioned—I didn't say it in my oral testimony but it's in my written testimony. I tend to agree, that I think one reason we single out certain groups is because those groups have been relatively effective in making sure they're heard.

I would think the logic of 203 argument suggests to me that Congress, I guess, if it embraces the true meaning of 203, would be, any time anyone lacks the adequate ability to read, either because of their language or their ethnicity, or just because they don't know how to read, the Federal Government should be there to translate the ballot for them. Language shouldn't be the issue; literacy should be the issue.

Mr. HYDE. In other words, if somebody does not speak English well or adequately, and is over 50 years old—young people I'm not as sympathetic to. I mean, the way to learn the language, you send your kids to school and they learn it. But older people, I can see the difficulty.

But if you file, like you file for an absentee ballot, you just file and say I would like this translated in Korean, this Government ought to have the resources, or local government have access to resources, to provide the ballot in Korean. But the ballot would still be in English. The official ballot would be in English but you'd have a translation.

Is that what you're suggesting?

Dr. HICKOK. Well, I guess what I'm suggesting is the logic of the argument is, if individuals—if we feel, or Congress feels, discrimination takes place because people can't read the ballot, that is really a language issue or a literacy issue as much as a foreign language issue. So my argument would be, the logic of it would be, make sure that the Federal Government, I guess, takes care of everyone that can't read the ballot, not just because they're one of those original groups but because they can't read the ballot.

I don't know if that's—I certainly would be opposed to that, but the logic to me seems relatively consistent there.

Mr. HYDE. I think someday a political scientist might make this a project. The leaders of many different groups are here, and the groups they're supposed to lead are over here.

Now, I say that because we are confronted with some interesting poll figures. In San Francisco, in 1983, 64 percent of the voters in a referendum voted against bilingual ballots and asked Congress to repeal the law mandated them. California, in 1984, 72 percent of voters in a statewide initiative voted against bilingual ballots and asked Congress to repeal the law mandating them. California, 1986, 63 percent of the voters approved a constitutional amendment making English the State's official language. In 1988, Colorado, Arizona, Florida, voters in all three States decisively voted to make English their State's official language. Alabama, 1990, 90 percent of the voters approved a constitutional amendment making English the State's official language. The San Francisco Chronicle poll, March 1990, 90 percent of Filipino Americans, 78 percent of Chinese-Americans, and 70 percent of Hispanic-Americans favored making English the official language.

Do you see a groundswell for bilingual ballots other than in the leaders of some of these special interest groups?

Dr. HICKOK. Based on the figures you just gave me, no.

Mr. HYDE. These figures are valid figures, are they? OK.

Thank you very much.

Mr. EDWARDS. On that last subject, we aren't just saying as really both of you are saying, that these are special interest groups that are getting special privileges. These are groups of Americans who have been systematically discriminated against and not allowed to vote, for various reasons.

Since the beginning of our country, we have tried to encourage qualified people, over a certain age and so forth, to be able to vote. It's in our national interest. If you are old and blind, you are assisted. You can take somebody into the ballot enclosure with you to help you.

It seems to me, Ms. Dixon, that you don't want—that it's more important to you to have English-only ballots than to have qualified people understand what they're voting on. Isn't that correct?

Ms. DIXON. No, not at all.

Mr. EDWARDS. You think that is more important.

Ms. DIXON. No, not at all. The position that U.S. ENGLISH takes is that we want to—we agree with expanding franchise to those who were not included in the process. We totally agree with that concept. Where we differ is to what extent that should be done. Voting assistance materials in other languages are certainly a very effective way of achieving the goal of expanding the franchise, without having the actual official ballot printed in that other language. There should be some uniformity. So you achieve the goal of expanding the franchise to language minorities, who are not included in that process now, and at the same time maintain some sort of integrity in the system.

Mr. EDWARDS. In other words, you want them to "bone up" on the material outside of the ballot place and then come in?

Mr. HYDE. Or carry it in with them.

Ms. DIXON. Carry it, exactly. As is in our testimony, we suggested that, to carry it in with them, as many English speakers do, who get sample ballots ahead of time.

Mr. EDWARDS. You let them carry a dictionary in with them to translate it.

Ms. DIXON. No, they have——

Mr. EDWARDS. The ballot is just going to be in English in your view.

Ms. DIXON. No. That's not what I'm saying. Let me try to explain it again.

The voting assistance materials, whatever materials they would receive prior to voting, anything to help them—candidate information would be printed in any language that it needs to be printed in, for any language minority group. Where we differ is extending voting assistance materials to refer to the actual ballot itself. We believe that the ballot should remain in the common language, English.

Mr. EDWARDS. Why?

Mr. HYDE. Because you have a sample ballot printed in Korean, or in Afghan, or in Farsi, in whatever you want. You have a sample ballot and you carry it in and look at that, then you look at this, and you vote. That's not tough.

Ms. DIXON. I think I understand the question. You're saying, in terms of its voting assistance materials, why don't we include the bilingual ballot? That is a fair question.

U.S. ENGLISH believes that, as we propose in H.R. 123, the Language of Government Act, which proposes an official language, that Government operations should occur in the common language for everyone's mutual benefit. One of those Government operations would be an official act, and an actual ballot is an official act of the Government, whereas government services—and this is in our bill—would be provided in whatever language they need to be provided in. Voting assistance materials would be such a government service. So that's where we make the distinction, that voting assistance materials is a government service which should be provided in any language, as compared to the actual ballot, which is an official act of the Government and should be maintained in English.

Mr. EDWARDS. But it doesn't bother U.S. ENGLISH that this is going to be difficult for people, that it's going to discourage them from voting, that they're going to have to carry extra materials in and translate what's on the ballot from the documents that they are allowed to study before and during the voting process?

Mr. HYDE. Would the gentleman yield?

Mr. EDWARDS. Yes.

Mr. HYDE. I understand the gentleman never has to carry anything into the polling booth because the gentleman votes the straight ticket. I understand that.

[Laughter.]

Mr. HYDE. But some people want to move around and they do carry sample ballots, which every organization worth its name issues. The favorite candidates are in big print and the other guys are in little print, if they're there at all. But that's no hardship, really.

Mr. EDWARDS. That's not the issue. It is easier in Chicago because you just push one button, I understand.

[Laughter.]

Mr. HYDE. Not me. I vote for the candidate, unlike the gentleman.

[Laughter.]

Mr. EDWARDS. Mr. Kopetiski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Henry, I want you to know that it's not necessarily in my best political interests for all my Russian farmer friends out there to be able to read the ballot and vote.

Mr. HYDE. Oh, I can't believe that.

Mr. KOPETSKI. I have a couple of questions here. I'm trying to figure this out.

Now, your organization, Ms. Dixon, they wouldn't have any problem with this if we were requiring the voting assistance materials be in another language—is that right?

Ms. DIXON. That's right.

Mr. KOPETSKI. We could mandate that. We could mandate that there be—we'll pick a figure. Let's say if 3 percent of the community, school district, of the county, is Hispanic, then there shall be a sample ballot printed in Spanish, but the ballot would be in English; is that what you're saying?

Ms. DIXON. Yes, I am.

Mr. KOPETSKI. We could mandate that they shall provide.

Ms. DIXON. Whatever the provisions of the bill would be. If you want to use the word mandate, that's fine.

Mr. KOPETSKI. Yes, require it, not suggest that—OK.

Isn't this really form over substance? I mean, we do all this other thing but provide the ballot; we provide them a sample ballot, and maybe we require the voter's pamphlet statement be in that second language; we do everything but the ballot. I mean, it's sort of like why not go just a little bit more. The answer is, because you're predecessor's testimony the other day was——

Ms. DIXON. I'm sorry. Who was my predecessor?

Mr. KOPETSKI. Mr. Tryfiates.

Ms. DIXON. That's not my predecessor. Those are two very distinct and different organizations, English First and U.S. ENGLISH. So he's not my predecessor, no.

Mr. KOPETSKI. There's more than one of you. I see.

Ms. DIXON. Yes, there is.

Mr. KOPETSKI. Well, maybe you disagree with it, but their testimony was English is just as important as voting in our country, you know, speaking English. Is that your position?

Ms. DIXON. No, it's not.

Mr. KOPETSKI. Voting is more important than speaking English.

Ms. DIXON. Absolutely.

Mr. KOPETSKI. Now, the next question then is, in your testimony you say you believe that the official language of government is and must remain English.

Now, who made it official?

Ms. DIXON. We're trying to. It's——

Mr. KOPETSKI. Oh. So your testimony is inaccurate?

Ms. DIXON. No, it's—let me explain. English is, for all intents and purposes——

Mr. HYDE. Speak slowly.

[Laughter.]

Ms. DIXON. English is, for all intents and purposes, the de facto official language, but it has no actual official status. That is what H.R. 123, the Language of Government Act, seeks to accomplish, to give it official status.

Mr. KOPETSKI. Well, I'm trying to understand your testimony because it's not clearly written. So should your testimony be that the de facto official language of government is and must remain English?

Ms. DIXON. If that would make it clearer, sure.

Mr. KOPETSKI. And who should decide—I mean, who's the official that says it's official?

Ms. DIXON. It's legislative. It's a matter of going through the legislative process. It's been approved in 18 States, and we're taking the process through Congress. That is the body that would make the determination as to whether it should be official, and more importantly, what official means.

I think maybe I really need to clarify that official does not mean English only. If we have a provision in our bill that says government services should be offered in other languages, then the bill obviously is not English only.

Mr. KOPETSKI. Very good, but that bill isn't before us.

Now let me ask you this. It says official language of government. Did you mean to say government or of the United States?

Ms. DIXON. I'm sorry, please repeat.

Mr. KOPETSKI. Your testimony here is that the official language of government is and must remain English. Now, do you want the official language of the United States to be English, or do you want the official language of government to be English?

Ms. DIXON. The testimony stands as written. We specifically named the language of government, not of the United States.

Mr. KOPETSKI. OK. But it's government at every level, whether you're talking about the Federal Government or local school board or a vector control district?

Ms. DIXON. Yes.

Mr. KOPETSKI. It's any form of government, whatever that may be, you want English to be the official——

Ms. DIXON. Exactly. But when you say official language, you also have to look at how official is defined in the bill. I'm not sure if you might be overextending what official actually means.

Mr. KOPETSKI. This is very instructive.

As an aside, I can imagine being somebody from another country, or even born in this country and raised with a different language, and trying to understand a serial bond measure that's described on the ballot in English. I mean, your testimony wasn't very exact, and I'm sure you're paid a lot of money to write this stuff—I hope you get paid a lot of money to write this stuff. Just imagine somebody who walked out of Russia, is 55 years old, and she's trying to raise a family and have a productive farm, and then try to understand this Government gobbledygook. Maybe it would be easier in that other language.

The last part then is just the consistency of your testimony. That has to do with going back to the first page of your testimony where you talked about you do favor increased participation in one of the most profound privileges of citizenship—actually, I think you should have used "right" there—which is voting.

Do you think, if providing ballots in other languages dramatically increases voter participation—you know, we do some studies and all of that and we're just absolutely certain that it is going to increase dramatically voter participation by having another ballot—should we do that as a society?

Ms. DIXON. If there was conclusive evidence that the actual ballot being printed in another language would expand the franchise, then yes.

Mr. KOPETSKI. Thank you.

Thank you, Mr. Chairman.

Mr. HYDE. But, Ms. Dixon, there isn't such evidence.

Ms. DIXON. No, there is not.

Mr. HYDE. In fact, the evidence is to the contrary; is that not so?

Ms. DIXON. Absolutely.

Mr. HYDE. And we ought to require such evidence before the Federal Government intrudes into something that really is handled best at the local level and ought to be.

Ms. DIXON. Yes, that's true.

Mr. EDWARDS. If the gentleman would yield, that is the gentleman's interpretation of the testimony and of the statistics that exist. I think I should point out that we had several credible witnesses that said the statistics indicate that the accessibility and use of bilingual ballots, in some areas, by groups of people historically discriminated against, such as Hispanics, has enormously increased the number, and in their interpretation the percentage of citizens participating in the electoral process—which is something

I think we will all agree is very important to the good health of any democracy.

Mr. Hyde. Well, these projections that we've heard about I'm sure would be very interesting to the statisticians at the Census Bureau, because their figures do not bear them out.

Thank you, Ms. Dixon, for your excellent testimony.

Mr. Edwards. We thank you all. The subcommittee is adjourned.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

VOTING RIGHTS ACT: BILINGUAL EDUCATION, EXPERT WITNESS FEES, AND PRESLEY

WEDNESDAY, APRIL 8, 1992

House of Representatives,
Subcommittee on Civil and Constitutional Rights,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:41 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, John Conyers, Jr., Michael J. Kopetski, Henry J. Hyde, Howard Coble, and Bill McCollum.

Also present: Melody Barnes, assistant counsel, and Kathryn Hazeem, minority counsel.

Mr. Edwards. The subcommittee will come to order.

The Voting Rights Act has been an important tool for the disenfranchised. The breadth of this legislation has provided us with an effective means to dismantle subtle and sophisticated discrimination practices. In the past year, the Supreme Court has rendered two decisions that we consider curtail the effectiveness of the Voting Rights Act.

In January, the Court severely narrowed the scope of section 5 of the act in its *Presley* case. As a result of *Presley*, when a jurisdiction proposes to strip an elected official of the duties he or she was elected to carry out, no preclearance requirement exists according to this decision.

The second Supreme Court decision that is enormously disturbing to us affects the Voting Rights Act, and the name of the case is *West Virginia University Hospital, Inc.* v. *Casey*. The Court held that expert fees may not be shifted to the losing party as a part of reasonable attorneys' fees. This decision, in our view, affects voting rights litigation severely.

The purpose of today's hearing is to discuss these important issues and others so that we may address them in an effective way.

Mr. Hyde.

Mr. Hyde. I have no statement. Thank you, Mr. Chairman.

Mr. Edwards. Our first witness today is our good friend, the Hon. John Dunne, Assistant Attorney General for the Civil Rights Division in the Department of Justice. During his tenure as Assistant Attorney General, Mr. Dunne has been of great assistance to us in the area of civil rights, and we are always delighted to have him here. We compliment him on his work and that of his excellent staff, and he is here today to discuss a couple of the things that I talked about.

We welcome you, Mr. Dunne. Would you introduce your colleague and proceed. Without objection, the entire statement that you have will be made a part of the record, and you may proceed on your own time.

STATEMENT OF JOHN DUNNE, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY GERALD JONES, COUNSEL

Mr. DUNNE. Thank you, Mr. Chairman and Mr. Hyde. It is my pleasure to present, at my right, Gerald Jones, who is my counsel and, until assuming that position, had served for many years with distinction as chairman of the Voting Rights Section in the Civil Rights Division.

I appreciate the opportunity to appear here today. I ask that, although having filed my formal remarks, I be given the opportunity to make some brief additional remarks, perhaps summarizing the contents of that statement.

Mr. EDWARDS. Without objection.

Mr. DUNNE. It is my pleasure to appear today to state in the strongest terms the support of the Department of Justice for a 15-year extension of section 203 of the Voting Rights Act, one of the minority language provisions. I am also pleased to have the opportunity to discuss the Supreme Court's decision in *Presley* v. *Etowah County* and the award of expert fees in Voting Rights Act cases. We are all aware, unless the Congress acts, section 203 of the act will expire on August 6 of this year, and I am here to urge this subcommittee and the Congress to make extension legislation a top priority.

Section 203 was first added to the Voting Rights Act in 1975 in recognition that large numbers of citizens in our country who spoke languages other than English had been effectively excluded from participation in our electoral process. The Department of Justice has interpreted the broad language of section 203 to encompass the full range of voting-related activities beginning with the provision of any material regarding how to register to become a voter through assistance at the actual moment of casting a ballot.

At present, some 197 jurisdictions in 20 States are covered by the section 203 provisions. Every region of the country is affected, from Massachusetts to Florida, from South Dakota down to New Mexico, and Alaska to California, and out to Hawaii. Because language assistance is also provided in some of these jurisdictions pursuant to section 4 of the Voting Rights Act, the expiration of section 203 would not lift the minority language requirements from all of these jurisdictions. However, according to coverage determinations based on 1980 census data, some 68 counties would no longer have to provide language assistance that now is required if 203 were to expire.

We support one important change in section 203's coverage formula. Several jurisdictions with large minority language populations are not covered under section 203's current formula because these individuals are submerged in a very large majority language population and therefore cannot satisfy the section's 5 percent trigger.

For example, in Los Angeles County there are over 175,000 minority language Hispanic citizens, but they are not covered by section 203 because Los Angeles contains over 8 million people. In Cook County, IL, some 75,000 minority language Hispanic citizens are not covered because Cook County's population is over 5 million. In New York City's Queens County, 43,000 minority language Hispanic citizens are not covered because the population of Queens is nearly 2 million.

We therefore support adding a numerical trigger of 20,000 minority language individuals. This trigger would pick up the largest jurisdictions and reach the majority of individuals who need language assistance but who are not now receiving it.

According to our calculations, once again based on 1980 census data—since data for the 1990 census will not be available for what we understand may be another 6 weeks—a trigger of 20,000 individuals would bring in seven additional jurisdictions containing roughly 385,465 minority language individuals. Now lowering the trigger below 20,000 would bring in more jurisdictions but we believe without proportional increases in the number of individuals benefited by language assistance.

Although many jurisdictions have responded well to section 203, enforcement activity has been necessary. The Department has had to file five lawsuits, all of which have been resolved successfully through consent decrees, and since 1975 some 1,154 Federal observers have monitored elections to determine the extent to which language minority citizens were able to receive materials, instruction, and assistance in minority languages.

We have concluded from these observations that there are many citizens whose limited ability in England language seriously compromises their ability to participate in the electoral process. We also can conclude that providing bilingual materials, instruction, and assistance does make a very real difference for minority language voters with limited England language capabilities.

Let me cite, for example, there can be little doubt that providing electoral materials in Spanish has greatly facilitated political participation by Hispanic citizens. In 1986, a study by the General Accounting Office found that just in Texas alone some 85,000 individuals received oral assistance from local officials at the polls in the November 1984 general election and some 69,000 received written assistance.

Some of the problems that we continue to see regarding the provision of language assistance to native Americans help to illustrate the continuing need for that assistance. Many native Americans, particularly older individuals, continue to speak their traditional languages and live in isolation from English-speaking society.

Because many native American languages are not written, oral assistance is frequently required. Also, it is often difficult to translate concepts into native American languages because of sharp cultural differences. Many common electoral terms such as "referendum," "bond," even "governor" simply defy translation. Because of these obstacles, many native Americans simply cannot pass meaningful ballots without language assistance.

We cannot be reminded too often that the right to vote is preservative of all of the other rights that we cherish in this country. It is the first obligation of our democracy to ensure that our citizenry is given the opportunity to cast informed and effective ballots. That is the goal of section 203. It seeks to ensure that citizens have the information they need to participate effectively in the political process, and I therefore urge in most strong terms that Congress act promptly to extend section 203.

Turning to *Presley* v. *Etowah County Commission,* there is no doubt that we were disappointed by the Court's decision which refused to adopt the standard that the Department had advocated in its amicus brief. The Court held that the three ordinances at issue were not changes affecting voting and therefore did not require preclearance pursuant to section 5.

The United States argued that transfers of decisionmaking power of elected officials are subject to preclearance when the changes reallocate decisionmaking authority, such as the power to tax, to legislate, and, as was the case in *Presley,* the power to control road, bridge, and other transportation projects which were the exclusive authority of the commissioners, because such transfers affect the power of a citizen's vote.

It is difficult to assess the impact of this decision at this time. First, the Supreme Court did not define the parameters of the decision. Second, it is difficult to know how many transfers of authority would be submitted for preclearance if we had prevailed in *Presley,* and let me cite what I mean.

In 1991, roughly 73 of the more than 18,000 submissions that we received for preclearance—18,000 submissions—dealt with transfers of authority over nonvoting matters. Roughly one-half of these 73 dealt with changes in the form of government, such as from a mayor/council to a council/manager form of government. We did not object to any of these transfers of authority.

These numbers may not be entirely accurate indicators of the number of such transfers of authority that would be submitted for preclearance if *Presley* were overturned. In addition, it may be that there will be an increase in transfers of authority resulting from the electoral successes engendered by the 1982 amendment of section 2 of the Voting Rights Act. Let me explain what I mean.

The creation of the results test has had a profound impact in enabling minority candidates to win election. As more minorities are elected, some jurisdictions could respond, as we found them to do in the Russell and Etowah County situations—could respond by diminishing the value of the offices won, not unlike what we witnessed in Etowah and Russell. We are not able to predict at this point whether or to what extent that will happen. Thus, as you can see, Mr. Chairman, the Department has been examining the question of legislative response to *Presley,* and we will continue to examine any evidence that significant transfers of authority with a potential for discrimination are occurring.

Finally, a point that you raised in your introductory comments: We understand that the subcommittee is interested in our views regarding the availability of expert fees in Voting Rights Act cases. These cases frequently require contributions of statisticians to perform complex regression analyses, political scientists to interpret election results, and historians to recount past discrimination or to reconstruct the events leading to the adoption of a local law.

The cost of these experts can make it more difficult for private plaintiffs to pursue, and I emphasize private because the Government is not entitled either to attorney fees or expert fees under the Civil Rights Act in other sections, so I emphasize private plaintiffs, and if I may suggest, I think it is going to be a rewarding hearing from other speakers who have fought out these battles in the trenches on behalf of private litigants.

We have not yet reached a final determination, however, whether legislation shifting the burden of paying experts in successful voting rights cases is appropriate, but in the spirit in which you opened these hearings and I hope the spirit you recognize that we have been working in, we want to continue to discuss this, because it was obvious from our support of the concept with the Civil Rights Act of 1991 that it certainly is a very important subject to be focused on.

That is the extent of my prepared statement. I would be happy to respond to any questions.

Mr. EDWARDS. Thank you very much, Mr. Dunne.

[The prepared statement of Mr. Dunne follows:]

PREPARED STATEMENT OF JOHN R. DUNNE, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear today to state in the strongest terms the support of the Department of Justice for a 15-year extension of section 203 of the Voting Rights Act, one of the minority language provisions. I am also pleased to have the opportunity to discuss Presley v. Etowah County, and awards of expert fees.

As you are aware, section 203 of the Act will expire on August 6 of this year unless extension legislation is passed and signed into law before that date. I am here to urge this Subcommittee and Congress to make such legislation a top priority.

Section 203 was first added to the Voting Rights Act in 1975 in recognition that large numbers of citizens in our country who spoke languages other than English had been effectively excluded from participation in our electoral process. Congress found that the denial of the right to vote among such citizens was "directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation." 42 U.S.C. 1973aa-1a(a). Congress, therefore, required that political subdivisions (this has generally meant counties) provide language assistance if 1) more than 5% of the citizens of voting age in the county are members of a language minority, and 2) the illiteracy rate of these individuals is higher than the national illiteracy rate. As a practical matter, counties that fall within the first requirement generally satisfy the second. For purposes of section 203, the term "language minorities" is defined as "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage."

Section 203 was initially slated to expire in 1985, but during consideration of the 1982 amendments to the Voting Rights Act it was extended for seven more years until 1992. The 1982 extension contained one substantive change, commonly referred to as the Nickles Amendment. It directed the inclusion of only those minority language citizens "who do not speak or understand English adequately enough to participate in the electoral process" in determining whether the 5% coverage trigger was satisfied. This amendment recognized that the census in 1980, for the first time, included questions regarding an individual's language ability, making it possible to target assistance on those areas where language was a functional impediment to political participation.

Section 203 provides that whenever a covered county "provides any registration or voting notices, forms, instructions, assistance, or other material or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." The Department of Justice has interpreted this broad language to encompass the full range of voting related activities, beginning with the provision of any material regarding how to register to become a voter through assistance at the actual moment of casting a ballot. Section 203 explicitly provides that when the minority language is unwritten, as in the case of many Native Americans and Alaska Natives, the county must provide oral assistance in the minority language.

At present, some 197 jurisdictions in 20 states are covered by section 203. Every region of the country is affected, from Massachusetts to Florida, from South Dakota to New Mexico, from Alaska to California, and Hawaii. Because language assistance is also provided in some of these jurisdictions pursuant to section 4 of the Voting Rights Act, the expiration of section 203 would not lift the minority language requirements from all of these jurisdictions, but according to coverage determinations based on 1980 census data, some 68 counties would no longer have to provide language assistance that now is required.

Two comments are necessary to clarify these figures. First, section 4 of the Voting Rights Act mandates language assistance if

> (i) over 5% of the voting age citizens were on November 1, 1972, members of a single language minority group; (ii) registration and election materials were provided only in English on November 1, 1972; and (iii) less than 50% of citizens of voting age were registered to vote or voted in the November 1972 Presidential election.

This formula draws in the entire states of Alaska, Arizona, and Texas, and counties in California, Florida, Michigan, New York, North Carolina, and South Dakota. But, because coverage was fixed as of conditions in 1972, this section does not respond to changes in demographics in the way that section 203 can. It is important to extend the protections of section 203 so that the 68 jurisdictions currently beyond the scope of section 4 will continue to be covered.

The second note of clarification is that all of our figures regarding coverage are based on 1980 census data. We have asked the Census Bureau to expedite the production of the 1990 census data and hope that they will be available within 2 to 3 months.

We support one important change in the coverage formula. Several jurisdictions with large minority language populations are not covered under section 203's current formula because these individuals are submerged in very large majority language populations and, therefore, cannot satisfy the 5% trigger. We, therefore, support adding a numerical trigger of 20,000 minority language individuals. This trigger would pick up the largest jurisdictions and reach the majority of individuals who need language assistance but are not now receiving it. According to our calculations -- again, based on 1980 census data -- a trigger of 20,000 individuals would bring in seven jurisdictions containing roughly 385,465 minority language individuals. Lowering the trigger below 20,000 would bring in more jurisdictions without proportional increases in the number of individuals benefited by language assistance.

Although many jurisdictions have responded well to section 203, enforcement activity has been necessary. The Department has had to file five lawsuits, all of which have been resolved successfully through consent decrees.[1]

Four suits addressed the problems of Native Americans in six counties in two southwestern states (New Mexico and Utah). The consent decrees we negotiated under section 203 provide the means for the Native American population in these counties to enter the electoral mainstream. The jurisdictions included in these lawsuits would no longer be required to provide language assistance if section 203 were not renewed.

In another lawsuit, we remedied the failure of the City and County of San Francisco adequately to provide bilingual election materials and assistance to Chinese-speaking and Spanish-speaking voters.

Since 1975, some 1154 federal observers have monitored elections to determine the extent to which language minority citizens were able to receive materials, instruction, and assistance in minority languages. They have been sent to eleven different counties in six states -- Arizona, California, New Mexico, New York, Texas, and Utah -- on 18 election days and have monitored the treatment of Native American voters, Hispanic voters, and Chinese American voters.

---

[1] See United States v. City and County of San Francisco, C.A. No. C-78 2521 CFP (N.D. Cal., filed Oct. 27, 1978; consent decree May 19, 1980); United States v. San Juan County, New Mexico, C.A. No. 79-508-JB (D.N.M., filed June 21, 1979; consent decree Apr. 8, 1980); United States v. San Juan County, Utah, C.A. No. C-83-1287 (D. Utah, filed Nov. 22, 1983; consent decree Oct. 11, 1990); United States v. McKinley County, New Mexico, C.A. No. 86-0029-M (D.N.M., filed Jan. 9, 1986; consent decree Oct. 9, 1990); United States v. State of New Mexico and Sandoval County, C.A. No. 88-1457-SC (D.N.M., filed Dec. 5, 1988; consent decree May 17, 1990).

We can safely conclude from our experience in these various states and counties that there are many citizens whose limited ability in the English language seriously compromises their ability to participate in the electoral process on an equal basis with other voters. We also can conclude that providing bilingual materials, instruction, and assistance makes a real difference for minority language voters with limited English language abilities.

Both rates of voter registration and actual participation in elections by Hispanic individuals have increased since section 203 was enacted. Obviously, a variety of factors contributed to these gains in the Hispanic community, but there can be little doubt that providing electoral materials in Spanish greatly facilitated these changes. Indeed, the evidence is that Hispanic citizens have used language assistance where it was available. A 1986 study by the General Accounting Office, Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election, found that in Texas, some 85,000 individuals received oral assistance at the polls in the November 1984 general election, id. at 32, and some 69,000 received written assistance. Id. at 25.

Some of the problems that we have seen and that we continue to see regarding the provision of language assistance to Native Americans help to illustrate the continuing need for that assistance. Because many Native American languages are not written, oral assistance is frequently required. Also, it is often difficult to translate concepts into Native American languages because of cultural differences. Many common electoral terms simply defy translation. These factors have exacerbated the difficulties faced by Native American voters.

Our federal observers have reported serious shortcomings -- as recently as in the 1988 and 1990 elections -- in providing minority language assistance at polling places. These problems tend to be particularly pronounced regarding non-candidate ballot issues, such as constitutional amendments and bond issues. The inadequacies in trying to translate these difficult issues for Native Americans were particularly evident in our monitoring of the 1988 and 1990 elections in the Southwest. Translations were often nonexistent, but even when translators were available, the message conveyed to minority language voters often did not resemble the issue on the ballot and it was impossible for a minority language individual to cast an informed vote. As a result, many simply did not vote.

We have encountered a failure to provide absentee voting information to Native Americans in their native languages and this failure is reflected in absentee voting rates. In addition, Native Americans are frequently purged from voter lists at higher rates than other voters. We have also observed inadequacies in explaining the simple mechanics of voting, including the procedure for writing in a candidate's name. In short, Native

Americans have needed language assistance, and enforcement of section 203 has been and continues to be necessary to ensure that they receive it.

Native Americans present a compelling rationale for the continuation of section 203. While naturalized citizens must pass an English proficiency test to become citizens, Native Americans are subject to no such requirement. Indeed, it is the declared policy of the United States government, as enacted by Congress, to encourage the use and preservation of Native American languages. To an extent that many people do not realize, many Native Americans -- particularly older individuals -- continue to speak their traditional languages and live in isolation from English- speaking society. For example, in both Apache and Navajo Counties, Arizona, more than one-half of the Navajos of voting age lacked sufficient English fluency to participate in English-only elections as of the 1980 census.

We cannot be reminded too often that the right to vote is preservative of all of the other rights that we cherish in this country. It is the first obligation of our democracy to insure that our citizenry is given the opportunity to cast informed and effective ballots. That is the goal of section 203. It seeks to ensure that citizens have the information they need to participate effectively in the political process. I, therefore, strongly urge Congress to act promptly to extend section 203.

Turning to Presley v. Etowah County Comm'n, the Court's decision refused to adopt the standard that the Department had advocated in its amicus curiae brief. The Court held that the three ordinances at issue were not changes affecting voting and, therefore, did not require preclearance pursuant to section 5 of the Voting Rights Act before they could be implemented. Two of the ordinances came from Etowah County, Alabama. As a result of a consent decree, the county agreed to expand its county commission from four to six members. After elections were held and a black member was elected along with a white member to supplement the four holdover commissioners, the commission passed two ordinances over the opposition of the new members. The first gave the four holdover commissioners authority over road repair, maintenance, and improvement, while assigning less significant duties to the two new members. A second ordinance created a common fund from which road repair funds would be drawn. This fund replaced the prior practice of allowing each commissioner to decide how to spend funds allocated to his district.

The third ordinance came from Russell County, Alabama. It delegated control over road matters to the county engineer, who was appointed by the Commission. Previously, individual commissioners had exercised this authority.

We argued that any such changes in the power of elected officials are subject to preclearance when the changes reallocate decisionmaking authority, such as the power to spend, tax, legislate, and control road, bridge, and other transportation projects. We also argued that such changes affect the power of a citizen's vote and fall under the broad coverage that Congress intended for section 5.

The Court, however, rejected our interpretation of section 5, holding that the ordinances at issue did not have a sufficiently "direct relation to voting and the election process." Presley v. Etowah County Comm'n, 112 S. Ct. 820, 829 (1992). The Court stated that its prior cases requiring preclearance had all involved either "changes in election procedures" or "substantive changes as to which offices are elective," Id. at 828, and concluded that the Etowah and Russell County ordinances did not fall within these categories.

It is difficult to assess the impact of this decision at this time. First, the parameters of the decision remain undefined. For example, it does not appear that the Court held that all transfers of authority lie beyond the reach of section 5. It seems likely that those with a more direct relationship to control of election procedures remain covered. Likewise, it is open to argument that a transfer of authority from an elected official to an appointed official or vice versa that is sufficiently extreme to amount to a de facto change in the elective or appointive nature of an office would remain covered by section 5.

It is also difficult to know how many transfers of authority would be submitted for preclearance if we had prevailed in Presley. Since enactment of the Voting Rights Act, the Department has objected to seven transfers of authority that did not directly concern authority over voting matters and one transfer of authority to implement voting procedures. While it is impossible to reconstruct how many such changes have been submitted, our computer capabilities allow us to examine submissions for 1991. In that year, we received 18,113 changes for preclearance and roughly 73 dealt with transfers of authority over nonvoting matters. We did not object to any of these transfers of authority.

These numbers may not be entirely accurate indicators of the number of such transfers of authority that would be submitted for preclearance if Presley were overturned. Some jurisdictions may have considered the law unclear prior to Presley. Others may have foregone transfers of authority to avoid the preclearance requirement. In addition, it may be that there will be an increase in transfers of authority resulting from the successes engendered by the 1982 amendment of section 2 of the Voting Rights Act. The creation of the results test has had a profound impact in enabling minority candidates to win election. As more minorities are elected, it is conceivable that some jurisdictions could respond by diminishing the value of the offices won. We are not able to predict at this point whether or to what extent that will happen.

Of course, numbers do not tell the full story. The importance of the changes that would be subjected to section 5 review is at least equally important. Plainly, most such submissions have not had the purpose or effect of discriminating against minority voters. At present, we do not have reliable evidence indicating whether that pattern will hold for future submissions.

The Department, therefore, has been examining the question whether the Voting Rights Act should be amended to expand its preclearance coverage. We have not yet reached a conclusion.

Finally, we understand that the Subcommittee is interested in our views regarding whether awards of expert fees should be available in cases pursuant to the Voting Rights Act. Voting Rights Act cases frequently involve significant expert fees. Cases often require the contributions of statisticians to perform complex regression analyses, political scientists to interpret election results, and historians to recount past discrimination or to reconstruct the events leading to the adoption of local laws. These facts, however, do not automatically imply that a fee-shifting statute is needed or would be appropriate. The Department has begun to study this question, but we are not prepared to state a conclusion at this time.

That concludes my prepared statement. I would be pleased to answer any questions.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Mr. Dunne, your testimony notes that we are still relying on 1980 census data because the 1990 data isn't yet available. Don't you think it would be wise to wait until we have the necessary up-to-date data as much as possible to determine if there continues to be a problem before we extend section 203 for an additional 15 years?

Mr. DUNNE. Mr. Hyde, the more accurate information we have to make a judgment the sounder that judgment will be. As I mentioned in my remarks, I believe that we will have more reliable or more up-to-date data probably within 6 to 8 weeks. So if the Congress's schedule could allow such a deferral, that is a decision which I would have to leave with you.

However, I believe that based upon our onsite investigation, the problems encountered by minority language citizens not only at the polls but in acquiring sufficient information to make intelligent judgments are very real. We believe that the provisions of the Voting Rights Act, the bilingual provisions, have had a very salutary, identifiable effect measured in terms of greater participation, whether it is of those of Hispanic heritage or Asian-American or native Americans, so that we feel that we can, with confidence, espouse the extension of this measure. It probably would be with greater confidence if we had up-to-date data, but our experience on the scene, working with the individuals who are the intended beneficiaries of this legislation convinces us beyond any doubt that it is beneficial, it continues to be needed, and it should be extended.

Mr. HYDE. You know, if the rationale behind bilingual ballots, or multilingual ballots, is correct, I wonder why we confine our concern to the narrow group that we do—Asiatics, Hispanics, native Americans. What about the Polish immigrants that come into Chicago? We are told in Chicago there are more Poles there than in Warsaw. I don't know if that is true or not, but why have we lacked solicitude for them?

Mr. DUNNE. I don't know that we lack any solicitude for people of particular national origin than for others, but it was the Congress which decided when it enacted 203 to restrict its protections to those three categories—native Americans, Alaskan Natives, those of Hispanic heritage, and Asian-Americans. It was based upon very solid evidence that those four communities—if I may refer to them as that—had suffered deprivation and denial of participation in the electoral process.

Mr. HYDE. Even though they are citizens and learning the language is an element of becoming a citizen?

Mr. DUNNE. Oh, yes, because, for example, as we know, Puerto Ricans who have come to the mainland in great numbers are citizens by birth, but their language is basically Hispanic.

Mr. HYDE. Section 203 doesn't cover Puerto Ricans. They are under 4(e). But the generic problem is the same.

Mr. DUNNE. It is.

Mr. HYDE. People whose number one language is not English are going to need help if they are Hispanic, if they are Asiatic, and if they are native American.

Mr. **DUNNE**. If there is a problem with regard to the adequacy of determining eligibility for citizenship in terms of their ability to comprehend the English language, I think that is a concern for those who are setting those standards for citizenship. We joined with the Congress in addressing what was convincingly presented as a true need to assist those of language minority groups to participate.

A second point, if I may: It has been the declared public policy of our country, once again through acts of this Congress, to encourage native Americans to preserve their cultural heritage, and part of their cultural heritage is their speaking their own special historic language.

So it seems to me that it is the policy of our Nation to encourage respect and development of individuals' cultural heritage, that that does not conflict with the concept of being a good citizen. If, indeed, this Congress would reaffirm its conviction that we should do everything reasonable to encourage and enable full opportunity to participate in the electoral process, I think it is a very positive factor, and while some may say, "Hey, wait a minute, we all ought to be singing from the same book and the same language," that is a noble goal, but we are sufficiently far from that when we look at the realities of our cultural past as well as what is going on in our country that we ought to give a boost. This is a temporary measure, we are asking for an extension, we are not asking that this be enacted without a sunset provision.

Mr. **HYDE**. Yes. I have always been puzzled by our drive for integration and assimilation for most people, but Indians—native Americans, it has been a separatist ethic that has driven us, and I have been unable in my own mind to reconcile why integration was such a desirable thing, so desirable that we would bus kids across town, and yet separation is such a sacrosanct thing that we have encouraged separateness on the part of native Americans. I have never been able to get that straight in my mind; I'm still working on it, though.

Mr. Dunne, your testimony indicates that rates of voter registration and actual participation in elections by Hispanic individuals have increased since section 203 was enacted. The figures that I have from the current population survey in 1990 indicate that voter participation by Hispanics has declined in both absolute percentages and relative to white voters. According to figures from the U.S. Census in 1978, the gap in voting between white and Hispanic citizens was 14.5 percent. In 1982, the gap was 14.5 percent. In 1990, the gap was 15.2 percent. So in lieu of those figures, what figures do you have that support your statement?

Mr. **DUNNE**. Mr. Hyde, your office was kind enough to share those figures with us late yesterday afternoon. We are attempting to analyze them, but let me respond in two ways. One of my great concerns as I have had the responsibility for reviewing submissions for preclearance of redistrictings is the, disappointing for me personally, low rate of voter participation by Hispanic-Americans, and it is something that concerns me greatly. So my concern, I think, is shared by you.

But second, and taking a quick look at your figures, I don't believe that those figures relate to citizenship, they deal with voting age population but not those who are eligible to vote. Now I don't mean to dismiss those figures out of hand, but that is one of our quick reactions. So that, for example, we know that a tremendous migration of Mexicans into the Southwest has perhaps thrown those figures a little out of whack because they clearly, for the most part, are not eligible to vote.

In addition to that, I'm not sure how many of the counties which are presently covered by 203 which we attribute for having a very salutary effect in terms of aiding in participation—in this case Hispanics—how many counties would reflect that experience.

I would be happy to provide you with data—I don't have it with me, Mr. Hyde—with regard to what we base our conclusion. But our conclusion from analyzing those counties which have been the subject of 203 we believe supports our conclusion.

Mr. HYDE. Well, I think we should exchange statistics, and we will get you whatever we have. This page of statistics I have here from the Census Bureau on a table: Percent reported voting in congressional election years by race and Hispanic origin; this goes from 1966 to 1990. The numbers for Hispanics seem to be going down. In 1990, 46.7 percentage white vote, 39.2 black, and 21 percent Hispanic, of those eligible to vote, citizens. That is the lowest number. In 1986, there were 24 percent who voted; in 1982, 75 percent; in 1978, 23; in 1974, 22. So I just don't see this dramatic flocking to the polls now that things are in Spanish.

Anyway, we will give you what we have and be interested in your analysis.

Mr. DUNNE. Thank you.

Mr. HYDE. Thank you, Mr. Chairman.

Mr. EDWARDS. The gentleman from Oregon, Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Mr. Dunne, I found your testimony constructive in a number of areas. I would just like to comment that in the 1950's in terms of the Indians, we went through a period when the Federal Government decided that what was best for the Indians or native Americans was that we decertify their tribes, and now we are coming back and a lot of those cultural groups are coming back and asking the Congress to reestablish their tribes because they have found that it wasn't healthy for individual members and the group as an entity.

Mr. HYDE. I am looking forward to the day we have a resolution changing our country's motto to "E pluribus pluribus."

Mr. KOPETSKI. Well, I remember my Latin, and I think what Mr. Dunne is saying, in part, is that there is diversity in our country and that the voting process is such a fundamental right to us that we want to be inclusive in that with our citizens, and I am pleased to see the administration's position on this.

One question I have is, do you believe that if section 203 were to expire and single-language minority persons had to rely on voluntary assistance that bilingual assistance would be available to the extent that it is needed?

Mr. DUNNE. I hardly think so, because particularly in time of budget constraints at the State and local level as well as at the national level, if it were not mandated I don't think we would have found the broad assistance that we witnessed, for example, in

Texas in that one particular election I cite in my testimony. I think that unless a matter like this is mandated from the Congress, there will be a significant dropoff.

Now I am not unaware of the fact that quite a few States have their own requirements with regard to bilingual provisions, but most of those are not as strong as those directed by the statute as well as our regulations, and therefore I would be concerned that if it expired there would be a significant dropoff.

Mr. KOPETSKI. Some have suggested that perhaps you could provide voters pamphlets in the second language or in the other language and other accoutrements to help educate non-English-speaking voters about the election process and have that perhaps required but stop short at the ballot, because I think their line of reasoning is, the ballot is this sacred text and it should be in English. Could you comment on that? It seems to me that you go all the way except this one last step, and why not just go the last step.

Mr. DUNNE. First, the contribution by voluntary groups across the country has made an enormous contribution and assistance to achieving the goal of 203, so that that has been an important factor.

However, I believe that when you are talking about informing a voter with regard to helping him make a clear choice at the polls, when something is issued with the official stamp or seal, the imprimatur of the Government, I think it is far more persuasive and has greater credibility, obviously not to impugn the motives of any volunteer groups, but I think it provides a uniformity.

Of course, those of us who have run for office, the moment of truth is the most important phase of the whole electoral process, and to make sure that there are those who are available to assist the person actually marking the ballot or throwing a lever I think is a key ingredient, and that would be preserved under our legislation. Without it, I think that you maybe would be going 90 percent of the way, but that last 10 percent was probably the single most important phase of the whole electoral process.

Mr. KOPETSKI. Should we separate voting and the ballot in terms of whether it should be in English or not from the other debate in terms of English as the national language? Do you see a difference between the two: General debate on whether—there is a bill in Congress, for example, that would require that English be noted as the official language of the United States. Do you think this is separate from that whole debate?

Mr. DUNNE. I think it is a separate issue. I think both of those issues deserve public debate and airing and whatever degree of attention the Congress chooses to give to the English-only concept. I'm not authorized to really express personally or on behalf of the administration a position on that.

Mr. KOPETSKI. Why do you separate them? Why do you consider this different?

Mr. DUNNE. Because we see an immediate need in terms of assisting non-English-speaking citizens for assistance in the electoral process.

Mr. KOPETSKI. Why is that so important?

Mr. DUNNE. Because we believe that the right to vote is the most important right which undergirds and is supportive of all the other rights that we enjoy as citizens and that the need is so real as to warrant special attention for the exercise of that particular right.

Mr. KOPETSKI. And do you think it is more important than people speaking English in our country—the voting right?

Mr. DUNNE. I really would prefer not to express an opinion. It would only be my personal opinion; it would be inappropriate for me, appearing in my capacity. I would be delighted to talk with you about it, but I really don't want to be on record on that subject, sir.

Mr. KOPETSKI. I understand.

My final question is: These kinds of assistance, whether it be the ballot printed in Spanish, for example, or a voter's pamphlet, do you consider that a right of an individual, or is it a privilege that we are dealing with here? I understand that voting itself is a right, but is what we are talking about here a privilege or a right?

Mr. DUNNE. We believe that it is a proper definition by the Congress of how a right guaranteed under the Constitution can be made a reality. It seems to me what Congress is doing all the time; it is enacting measures in order to make real and achievable those protections by the Constitution, so that I believe that it is a right, maybe a lower case "r" right, but it is clearly a right, having been determined that by the Congress, and I stand behind that determination.

Mr. KOPETSKI. In terms of the legal terminology of privilege versus right, are you undecided on that, if these accoutrements are privileges or rights, or is it trying to get a legal basis of this?

Mr. DUNNE. I believe it is a right.

Mr. KOPETSKI. I find that interesting, because if it is a right, then everybody should have it, that we should print, make available to all, to anybody who is a citizen that speaks a different language; then they should be able to understand the ballot.

Mr. DUNNE. That is for you in the Congress to make the decision, where the need is and what the response of the Congress should be.

Picking up on Mr. Hyde's question, his concern for the large Polish community, if the Congress determines that there is evidence that, by reason of a number of circumstances, one perhaps an inability to speak and understand English, that they are being deprived of an opportunity to participate in the electoral process; that would be for you to decide. We have not seen any evidence, hard evidence, that there is a significant number of other-language-speaking people who need the same protections as provided under existing 203, but that would have to be a judgment based on your factfinding, much as you made the decision originally with 203.

Mr. KOPETSKI. OK. Thank you.

Mr. HYDE. Would the gentleman yield just for a second?

Mr. KOPETSKI. Yes.

Mr. HYDE. It is my position, Mr. Dunne, that it is patronizing, that the Hispanic can learn English, learn to read names of candidates just as easily as the Lithuanian or the Pole or anybody else. I can understand for older people it is very difficult to learn a new language, it is difficult to learn a new language anyway, but the way to learn it in America is the way the Poles learned it. They vote pretty well in Chicago, let me tell you. Ask Danny Rostenkowski.

Mr. EDWARDS. If the gentleman will yield, one of the bases——

Mr. HYDE. That is, when you let them vote—excuse me.

Mr. EDWARDS. That is correct. When Mr. Hyde and I wrote the 1982 bill, as I remember, that discussion came up, and one of the strong reasons why these particular groups were selected was that they historically and egregiously had been discriminated against, and I don't think that many of the other minority language groups fall into that category; we had to draw the line somewhere.

Incidentally, the time of the gentleman has expired.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

I have three meetings going on simultaneously. I apologize for my having been late.

Mr. Dunne, Mr. Jones, it is good to have you all with us, and I regret that I missed most of your testimony.

Mr. Dunne, one of the witnesses today who will subsequently appear will suggest that the Congress amend the Voting Rights Act to allow reimbursement of expert witness fees, consultant fees, and to allow the courts to even award multipliers of attorneys' fees.

Now I am aware of the procedure in this country whereby in certain instances the awarding of attorneys' fees is sanctioned, and in many instances properly so. I fear, however, the opening of fiscal floodgates when you start bringing in consultant fees, when you start bringing in multipliers of attorneys' fees, and perhaps even expert witness fees. What is your view on the need for such an amendment?

Mr. DUNNE. Our view is that we do not have sufficient evidence at this time to make a judgment as to whether there is a real need for it in the case of voting rights matters. However, I understand you are going to hear from some witnesses who have had real life experiences, and I assume they will give you hard dollars with regard to those matters.

I mentioned to the chairman at the outset that the Justice Department indicated a recognition that the awarding of expert fees to successful litigants is a concept which we supported in the debate and ultimate support of the Civil Rights Act of 1991. But in this specific context where those fees would be available solely to private litigants, since we don't have any entitlement under any other civil rights actions to those fees, we are not in a position to testify as to how real that need is.

However, we recognize the legitimacy of the principle, a principle which was rejected in the *West Virginia Hospital* case, but we just don't have enough information right now as to how real it is in this case. Of course, we would be happy to listen to that testimony and any other evidence.

Mr. COBLE. I hope I can. As I say, I have got two or three meetings going on. I will just say this and conclude, Mr. Dunne. What I fear, as I say, is the opening of fiscal floodgates. I can see local jurisdictions, municipalities, counties, that may well be strapped for money now being hit with this sort of demand that could conceivably cause havoc and chaos, particularly in counties that may have very small operating budgets to begin with. That is the fear that I express.

Thank you, sir.

Mr. Jones, did you want to add anything to Mr. Dunne's statement?

Mr. JONES. No.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Coble.

The gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. Thank you very much, Mr. Chairman.

Mr. Dunne, I have a couple of questions, one on 203 and one on the *Presley* case.

On the 203 question, the Nichols amendment that was passed some time ago sort of restricted all of the activity on the ballot issue in language to those situations where the citizens don't adequately speak English. I guess that is a pretty tough thing to determine. How, as a matter of practice, is that provision, the Nichols amendment, being implemented in the field?

Mr. DUNNE. It is determined by data from the Census Bureau. In the course of their inquiry, in the census they ask questions: "Your understanding of the English language can be classified as: Speaks very well; well, fair; or not so good." At any rate, the other three aren't important. If you answer any less than your comprehension is very well, you are considered then to fall into the category as not adequately prepared to participate knowingly in the electoral process.

Mr. MCCOLLUM. That is how the 5-percent is derived.

Mr. DUNNE. That is right, and those figures are certified to us by the Census Bureau.

Mr. MCCOLLUM. OK. So it is conceivable you could have an Hispanic community were the answers were "very well"—you know, they had more than 5 percent Hispanics in a county, let's say, but that the Census Bureau results in that county would show that their speaking ability of English was such that they would not qualify in the county for the Voting Rights Act application.

Mr. DUNNE. Yes, sir.

Mr. MCCOLLUM. Has that ever happened? I mean do you know of a case where a county has more than 5 percent Hispanics, let's say—and I'm just using Hispanics because that is the most common thing we hear about—and their proficiency in English was great enough that they were not covered by the voting rights provisions in the ballot?

Mr. DUNNE. Mr. Jones seems to believe that, somewhere in his 30 years of history with the Civil Rights Division, he knows of maybe a case or two. Let us go back and check our records. I would be happy to check that.

Mr. MCCOLLUM. I would be curious if you would document that for us.

[The information follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 9, 1993

Honorable Don Edwards
Chairman
Subcommittee on Civil and Constitutional Rights
Committee on the Judiciary
United States House of Representatives
Washington, D.C.

Dear Mr. Chairman:

This letter provides supplemental information regarding section 203 of the Voting Rights Act. It addresses whether there are jurisdictions in which the minority language population exceeds 5%, but those jurisdictions are not covered by section 203 of the Voting Rights Act because enough people speak English sufficiently well that the total number of minority language individuals for purposes of the Act falls below 5%. In other words, these jurisdictions would be excluded from coverage by the Nickles Amendment.

We have reviewed the citizen voting age population data provided to us in 1992 by the Census Bureau for seven representative states (California, Connecticut, Georgia, Hawaii, Illinois, Kansas, and New Jersey) to determine in which counties members of a language minority group constitute 5% or more of the political subdivision's citizen voting age population but in which members of that group who speak English less than very well constitute less than 5% of the subdivision's citizen voting age population. As the following list demonstrates, there are a number of such jurisdictions. All of the listed jurisdictions remain outside the coverage of section 203.

Jurisdiction	Group	% Citizen Voting Age Population	% English Less Than Very Well
California			
Amador Co.	Hispanic	5.9	0.6
Colusa Co.	Hispanic	10.9	2.7
Contra Costa Co.	Hispanic	7.3	1.1
Del Norte Co.	Hispanic	7.3	1.4
Glenn Co.	Hispanic	7.7	2.4
Inyo Co.	Hispanic	5.1	0.5
Lassen Co.	Hispanic	7.6	1.0
Madera Co.	Hispanic	20.2	4.9

Merced Co.	Hispanic[1]	19.5	4.5
Mono Co.	Hispanic	5.0	0.7
Napa Co.	Hispanic	6.5	1.1
Placer Co.	Hispanic	5.8	0.6
Sacramento Co.	Hispanic	8.6	1.2
San Francisco Co.	Hispanic	8.0	1.9
San Joaquin Co.	Hispanic	16.1	3.1
San Luis Obispo Co.	Hispanic	8.2	1.1
San Mateo Co.	Hispanic	9.3	1.8

Jurisdiction	Group	% Citizen Voting Age Population	% English Less Than Very Well
California (continued)			
Santa Barbara Co.	Hispanic	15.0	2.9
Santa Cruz Co.	Hispanic	9.3	1.8
Solano Co.	Filipino	6.0	1.3
	Hispanic	9.3	1.4
Sonoma Co.	Hispanic	5.6	0.8
Stanislaus Co.	Hispanic	12.5	2.6
Sutter Co.	Hispanic	7.6	1.8
Tuolumne Co.	Hispanic	6.0	1.0
Yolo Co.	Hispanic	12.6	2.1
Yuba Co.	Hispanic[2]	7.1	1.5
Connecticut			
Fairfield Co.			
Norwalk	Hispanic	5.3	2.3
New Haven Co.			
Meriden	Hispanic	9.5	4.1
New Haven	Hispanic	9.5	4.5
Waterbury	Hispanic	9.5	4.4
New London Co.			
New London	Hispanic	9.1	3.1
Georgia			
Chattahoochee Co.	Hispanic	8.1	1.3

---

[1] This county is covered under Section 4(f)(4) of the Voting Rights Act.

[2] This county is covered under Section 4(f)(4) of the Voting Rights Act.

Hawaii			
Hawaii Co.	Filipino	10.3	2.0
	Japanese	24.9	3.5
Honolulu Co.	Chinese	7.5	1.4
	Hispanic	5.5	0.4
Kauai Co.	Japanese	23.1	2.9
	Hispanic	8.9	0.9
Maui Co.	Japanese	19.9	2.9
	Hispanic	6.5	0.5

Jurisdiction	Group	% Citizen Voting Age Population	% English Less Than Very Well
Illinois			
Kane Co.	Hispanic	6.8	2.3
Kansas			
Finney Co.	Hispanic	17.1	4.1
Ford Co.	Hispanic	7.7	2.2
Grant Co.	Hispanic	15.3	3.6
Haskell Co.	Hispanic	8.4	2.9
Kearny Co.	Hispanic	9.6	2.0
Seward Co.	Hispanic	9.1	1.9
Stanton Co.	Hispanic	7.5	1.5
Stevens Co.	Hispanic	6.6	1.6
Wichita Co.	Hispanic	7.7	2.8
New Jersey			
Atlantic Co.	Hispanic	5.0	1.9
Cumberland Co.	Hispanic	10.4	4.8

If the Subcommittee would like any further information, please do not hesitate to contact me.

Sincerely,

M Faith Burton

M. Faith Burton
Acting Assistant Attorney General

cc: Honorable Henry J. Hyde
Ranking Minority Member

Mr. McCOLLUM. On the *Presley* case, one of the critics of the Justice Department's whole focus has said that they think that if you are looking at this from a broader perspective, the question is, where do you draw the line?

You know, it is too broad no matter what you do, and if you open the door because you have got to draw the line somewhere, and those who are defending *Presley* and saying your position is too liberal, if you will, on that subject simply would say that if you expand the scope of preclearance to the degree that might be otherwise implied in a decision other than *Presley* or in something we might do, that you will not have any boundaries that a local government can responsibly find without every case having to go to a challenge before you in some fashion, every change in government structure of any nature, and that that is not a very satisfactory position to put local government in.

How do you respond to that type of criticism? I mean that is a pretty broad-brushed criticism, and yet it has some appeal, because there is a potential, I suppose, in all of this for us to require you to have to stamp every minutiae if it is carried to the extreme. How do you respond to critics who say that we need the *Presley* decision for that reason?

Mr. DUNNE. Both the majority decision as well as the dissent acknowledged that it would be difficult to draw such a line. First of all, the majority decision punted on that, if you would; they deferred to some later date to define that line; and the dissenting Justice illustrated cases that, he would say, clearly fall within but others do not and acknowledged that it was difficult to draw the line.

One proposal, Mr. McCollum, for legislation was to simply codify our position in our amicus brief. Well, it is not quite that simple, because as you know from briefing an issue, you are briefing an argument with regard to specific facts. In fact, before coming here today I looked through that brief, and it reaffirmed my conviction that it would be very difficult to draw statutory language which would be sufficiently comprehensive but not go far into that world that the majority was very concerned about, nit-picking, if you will, or second-guessing virtually every decision that some legislative or other governmental body made.

So my message is that we are going to continue to look at it. We would hope we would have the opportunity to examine some legislative proposals and perhaps participate to bring about a response.

Mr. McCOLLUM. But right now, if we were to be doing something up here legislatively, you would be happier with the status quo than our tinkering around it without that thorough examination that you have not yet really done.

Mr. DUNNE. Until we are satisfied that there is a statute which we feel is sufficiently limited and clearly drawn, we could not endorse changing the decision in the *Etowah* case, as disappointed as we were with the outcome.

Mr. McCOLLUM. Thank you.

Thank you, Mr. Chairman.

Mr. EDWARDS. What we would like to do—and I am sure you would like to do it also, Mr. Dunne—since you are disappointed, and that is your official position, in the results of the *Presley* decision, I believe your staff and our staff are working together to have a proper legislative response, because the situation that has resulted from the *Presley* decision is unfortunate. Isn't that correct?

Mr. **DUNNE**. We are disappointed that the third prong or category under the *Allen* doctrine was narrowed beyond what we thought it should be, and we are trying to find a sensible way of opening that up without falling into the problems that would confer upon our preclearance authority the right to review virtually every decision made by some legislative or other governmental body.

But you have the commitment, as I hoped that you understood before this meeting. We would like to continue to work with the Members and the staff to see if we can find a solution.

Mr. **EDWARDS**. Thank you. We appreciate that, because we think the consequences are going to be rather unfortunate.

The only other question I have—you have made your position clear on expert fees, and we can discuss that further also. The triggering mechanism that you approve of is 20,000, let's take Los Angeles County, where there are so many men and women that should receive some assistance and should come under section 203. The registrar of voters wouldn't pass out bilingual ballots to everybody in the county or the city. Do these registrars have their means of identifying certain pockets of minority language people and just send the ballots out to them?

Mr. **DUNNE**. They certainly do, and we recognize that the folks who know best what the local needs are are those who are there on the local scene, and they have the authority to target the use of their resources at the community or communities where the need actually exists. They do have that under both the statute and our regulations.

Mr. **EDWARDS**. That would save a lot of money.

Mr. **DUNNE**. Yes.

Mr. **EDWARDS**. We welcome the presence of the gentleman from Michigan, Mr. Conyers.

Mr. **CONYERS**. Thank you, Mr. Chairman.

Good morning, Mr. Dunne.

Mr. **DUNNE**. Good morning, Mr. Conyers.

Mr. **CONYERS**. Who is with you today?

Mr. **DUNNE**. Pardon me. Gerald Jones, my counsel.

Mr. **CONYERS**. OK.

Now there are several ways we can approach this matter, and I apologize for not being here. This is a very important matter for me. Apparently my staff had interpreted your statement that you would come here to testify that you are not sure whether we need legislation to correct this decision. Is that right?

Mr. **DUNNE**. We believe that in light of the *Etowah* decision we should work with the Congress to see if we can work out language which will address our concerns, the position that we took before the Supreme Court, and that is what we are prepared to do.

Mr. **CONYERS**. OK. Now look, we have all been through this for decades, so I've got you. Now are you reflecting the administration's position?

Mr. **DUNNE**. I'm authorized to speak on behalf of the administration.

Mr. CONYERS. OK. But making it a little better, you are disturbed about the decision, and you hope we can do something about it, and you spoke specifically about that. I heard you saying about the part of it that we might be able to work on. OK. Let me tell you, that is perfectly outrageous, absolutely outrageous, that in 1992, since 1964, we are still playing this kind of game.

But, look, it is your show. You represent the President and the administration, not me, you know; I represent the First District of Michigan. But you ought to be absolutely ashamed of yourself in your responsibility to tell me that we are going to have to play around when this decision is setting a blueprint for jurisdictions to rip off the Voting Rights Act.

So we will do the same civil rights dance that we did for 1991 and the quotas, and we will do all of this stuff, and finally, in a couple of years maybe, we will get something happening.

Mr. Dunne, I am very disappointed in you, because we have had some very constructive conversations. But if you think that we are going to sit around here and play these kinds of hokey legal games as we see every racially dismissive or discriminatorily inclined jurisdiction in the country get the blueprint on how to go about doing it, just take away the power for the offices they were elected in and you have got it back again. What is the problem?

You have got voters' rights on the books, and you rip them off in the real world, and then we come and we commiserate: "It's a terrible thing, but we are not prepared to tell you what legislation is needed or not; maybe we do. We understand your problem, Congressman." Well, I can't take it much longer, and I'm not going to allow this kind of nonsense to pass for intelligent legislative inquiry.

You have got to do more than you are doing, sir. You have got to come clean in this job. You have got to show that the American system of government is for putting an end to ripping off black people politically after we give them the legislation for 20 years. That is your job, John. You can't half-step on this for the rest of your career over there. You are the guy in the driver's seat now. You are not somebody that is bent on ripping us off and have a bad record of race relations in your career; you don't have it.

Charlie Rangel praised you to the skies when you were nominated. I had never heard of you. I said, "Well, if Rangel says he is OK, send him a letter and let's start working it out." But we have got big problems in this country; we are racially divided. The racism of politics is pushing us further and further apart, and we come here on a ripoff case, and you are telling me that you understand, and you are sympathetic, but, hey, not to worry.

Mr. DUNNE. You have worked up my enthusiasm for the assignment. I will be happy to continue to work with you and your staff if you have any specific language we could look at. We are trying very hard to come up with the proper language.

Mr. CONYERS. Thank you very much.

Mr. DUNNE. I'm always willing to listen to your criticism because it keeps me on my toes, but we are going to continue to work together, and we are going to find a solution. That is my only commitment to you. We are going to work together to try to find a solution.

I'm sorry, Mr. Chairman, I interrupted you.

Mr. **Edwards**. Well, we of course accept that response, but we do count on you and your staff to work with us to bring out suggestions. You can see from the sincerity of Mr. Conyers that the *Presley* case is regarded as an enormous step backwards in civil rights and that as the word gets around we know, we all know, those of us who have been involved in this for a long time, that there are certain jurisdictions—too many in this country—that will be looking for an excuse to bypass, to sneak around, the civil rights laws and preclearance and everything else. So it really is terribly important that we work together and do it right away.

Are there further questions of Mr. Dunne?

I don't believe I have. We thank you both for appearing here today.

Mr. **Dunne**. Thank you, Mr. Chairman.

Mr. **Hyde**. Well, before Mr. Dunne leaves the room, I have been sitting here somewhat dismayed at the dressing down that he received. I have listened to Mr. Dunne many times, and I don't say that I agree with him on everything, but I found him to be a very sensitive, concerned public official and an excellent spokesman for the administration, and, speaking only for myself, I don't find him in need of having to be ashamed of himself at all. I think he has done a sensitive, constructive, intelligent job and continues to do so. So I just want the record to reflect my views on that.

Thank you, Mr. Chairman.

Mr. **Edwards**. Mr. Parker and Ms. Thernstrom: Frank Parker is director of the Voting Rights Project of the Lawyers' Committee on Civil Rights Under Law. Mr. Parker has also written extensively in the area of civil rights. His work includes the multi-award-winning "Black Votes Count: Political Empowerment in Misissippi After 1965."

I might say personally that this subcommittee, for many, many years, has sought the assistance and the guidance of Mr. Parker. He is one of the original heroes of the civil rights movement, and we are delighted to have him here.

Mr. Parker, without further ado, your full statement will be made a part of the record, and you may proceed. We are going to operate as closely as we can under the 5-minute rule, and when you witnesses see a little red light go on, you are supposed to at least wind up your remarks.

But welcome, and you may go ahead.

Mr. **Parker**. Would you like me to go first?

Mr. **Edwards**. Yes, go ahead, Frank.

STATEMENT OF FRANK PARKER, DIRECTOR, VOTING RIGHTS PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, DC

Mr. **Parker**. Thank you very much, Chairman Edwards, and I congratulate you and the subcommittee for holding these hearings. These are very important issues today in voting rights, and you are to be congratulated for this set of hearings. I think these have been excellently done, and I welcome the invitation to be here today.

Let me say in preface to my testimony that the Lawyers' Committee for Civil Rights Under Law fully supports the extension of section 203 of the Voting Rights Act. We consider it to be an extremely important provision which has been very, very helpful in assisting citizens whose first language is not English in both the voter registration and the voting process, and we fully support the legislation for that extension.

The focus of my testimony is on the two recent Supreme Court decisions on voting rights enforcement that have an important adverse impact on enforcement of the Voting Rights Act, and these are *Presley* v. *Etowah County Commission* decided by the Supreme Court on January 27, 1992, that severely restricted the scope of section 5 of the Voting Rights Act, and the second decision was *West Virginia University Hospitals* v. *Casey,* which barred the recovery of expert witness expenses in voting right litigation.

I think one of the disappointing things about the Supreme Court's decision in the *Presley* case is that the facts of that case were so compelling. In Alabama, most of the counties—and I think this is true of many States in the South—historically each county commissioner was responsible for maintenance and construction of the roads and bridges in his or her own individual district, and this was seen, particularly in the rural areas, as the most important function of the county commissioner, to maintain and construct those roads. The county commissioners let contracts, they hired the road crews, they could respond on an individual basis to requests from their constituents.

Of course, as in many States in the South, for many years after the Voting Rights Act was passed, county elections were on an at-large basis, and these two counties, Etowah and Russell Counties, were white majority counties, and the black populations, though statistically significant, were unable to elect candidates of their choice to the county commission because the elections were on an at-large countywide basis. So black voters were denied the opportunity to elect candidates of their choice to the county commission of these counties until 1986, and the first black county commissioners were elected in these two counties.

But then, no sooner did they get sworn into their jobs when they found that the responsibilities of the county commissioners that the white commissioners had before these black commissioners were elected were substantially diminished, and the black commissioners, or the county commissions on which these two blacks were first elected to serve were denied the power to control county roads and bridge construction within their own individual districts.

So they filed a lawsuit arguing that these changes could not be enforced without preclearance under section 5 of the Voting Rights Act, that these were changes with respect to voting, and the question was before the Supreme Court: How were these changes with respect to voting?

I think it is fairly obvious that these were changes with respect to voting, because the individuals in these districts, in these individual districts, could no longer vote for county commissioners who had the responsibility for constructing and maintaining county roads in those districts, that that power had been taken away from them, and so the power of the individual citizen to vote for county commissioners who could maintain their roads was taken away.

The Supreme Court ruled otherwise in a 6-to-3 decision and held that these were changes affecting governance rather than voting and were not covered by section 5 of the Voting Rights Act.

The three dissenting Justices, in an opinion by Justice Stevens, concluded that taking power from these minority elected officials and transferring it to the bodies which were essentially controlled by the white majority had the same potential for discrimination against minority voters as racial gerrymandering of district boundaries or switching from district to at-large elections.

Looking at an overview of the decision, the Supreme Court's decision is very, very significant for two very important reasons. First of all, this is the first Supreme Court decision since the Voting Rights Act was passed in 1965 to limit the scope of the coverage of section 5 of the Voting Rights Act. All prior Supreme Court decisions, beginning with *Allen* v. *State Board of Elections* in 1969, have affirmed an expansive scope of section 5 of the Voting Rights Act that it covers any change affecting the right to vote, regardless of how minor that change is.

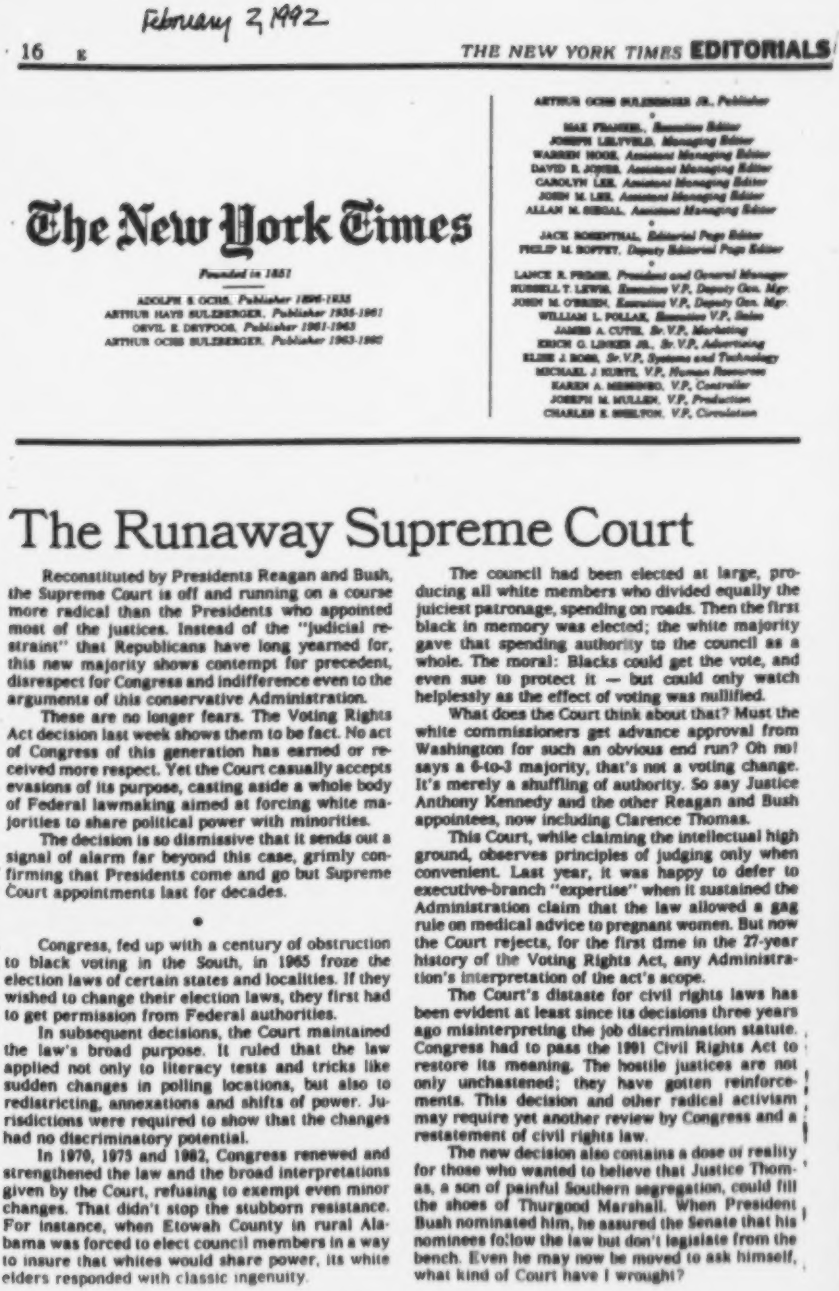
So the Justice Department regularly gets changes in polling places, changes from paper to machine ballots, changes in the method of balloting. Relatively minor mechanisms affecting the election process all have to be precleared, and the impact of the Supreme Court's decision is that this change that takes away the power of black elected officials, which has momentous implications not only for the right to vote in those districts but also for the powers of these elected officials, does not have to be submitted for preclearance under section 5.

The second significant aspect of this decision is that this is the first case in which the Supreme Court has rejected the Justice Department's interpretation of what is covered by section 5 of the Voting Rights Act, the first Supreme Court decision in 27 years to reject the Justice Department interpretation of the coverage of section 5. In all prior decisions, the Supreme Court has ruled that the Justice Department's interpretation is entitled to considerable deference.

There is widespread criticism of the *Presley* decision and its wake in my testimony, and I quote the New York Times and Washington Post editorials, and, Mr. Chairman, I request that those editorials be made part of this record. I have brought copies of them with me today.

Mr. EDWARDS. Without objection, it is so ordered.

[The editorials follow:]



February 2, 1992

16 E THE NEW YORK TIMES **EDITORIALS**

The New York Times

Founded in 1851

ADOLPH S. OCHS, *Publisher 1896-1935*
ARTHUR HAYS SULZBERGER, *Publisher 1935-1961*
ORVIL E. DRYFOOS, *Publisher 1961-1963*
ARTHUR OCHS SULZBERGER, *Publisher 1963-1992*

ARTHUR OCHS SULZBERGER JR., *Publisher*

MAX FRANKEL, *Executive Editor*
JOSEPH LELYVELD, *Managing Editor*
WARREN HOGE, *Assistant Managing Editor*
DAVID R. JONES, *Assistant Managing Editor*
CAROLYN LEE, *Assistant Managing Editor*
JOHN M. LEE, *Assistant Managing Editor*
ALLAN M. SIEGAL, *Assistant Managing Editor*

JACK ROSENTHAL, *Editorial Page Editor*
PHILIP M. BOFFEY, *Deputy Editorial Page Editor*

LANCE R. PRIMIS, *President and General Manager*
RUSSELL T. LEWIS, *Executive V.P., Deputy Gen. Mgr.*
JOHN M. O'BRIEN, *Executive V.P., Deputy Gen. Mgr.*
WILLIAM L. POLLAK, *Executive V.P., Sales*
JAMES A. CUTIE, *Sr. V.P., Marketing*
ERICH G. LINKER JR., *Sr. V.P., Advertising*
ELISE J. ROSS, *Sr. V.P., Systems and Technology*
MICHAEL J. KURTZ, *V.P., Human Resources*
KAREN A. MESSINEO, *V.P., Controller*
JOSEPH M. MULLER, *V.P., Production*
CHARLES E. SHELTON, *V.P., Circulation*

The Runaway Supreme Court

Reconstituted by Presidents Reagan and Bush, the Supreme Court is off and running on a course more radical than the Presidents who appointed most of the justices. Instead of the "judicial restraint" that Republicans have long yearned for, this new majority shows contempt for precedent, disrespect for Congress and indifference even to the arguments of this conservative Administration.

These are no longer fears. The Voting Rights Act decision last week shows them to be fact. No act of Congress of this generation has earned or received more respect. Yet the Court casually accepts evasions of its purpose, casting aside a whole body of Federal lawmaking aimed at forcing white majorities to share political power with minorities.

The decision is so dismissive that it sends out a signal of alarm far beyond this case, grimly confirming that Presidents come and go but Supreme Court appointments last for decades.

•

Congress, fed up with a century of obstruction to black voting in the South, in 1965 froze the election laws of certain states and localities. If they wished to change their election laws, they first had to get permission from Federal authorities.

In subsequent decisions, the Court maintained the law's broad purpose. It ruled that the law applied not only to literacy tests and tricks like sudden changes in polling locations, but also to redistricting, annexations and shifts of power. Jurisdictions were required to show that the changes had no discriminatory potential.

In 1970, 1975 and 1982, Congress renewed and strengthened the law and the broad interpretations given by the Court, refusing to exempt even minor changes. That didn't stop the stubborn resistance. For instance, when Etowah County in rural Alabama was forced to elect council members in a way to insure that whites would share power, its white elders responded with classic ingenuity.

The council had been elected at large, producing all white members who divided equally the juiciest patronage, spending on roads. Then the first black in memory was elected; the white majority gave that spending authority to the council as a whole. The moral: Blacks could get the vote, and even sue to protect it — but could only watch helplessly as the effect of voting was nullified.

What does the Court think about that? Must the white commissioners get advance approval from Washington for such an obvious end run? Oh no! says a 6-to-3 majority, that's not a voting change. It's merely a shuffling of authority. So say Justice Anthony Kennedy and the other Reagan and Bush appointees, now including Clarence Thomas.

This Court, while claiming the intellectual high ground, observes principles of judging only when convenient. Last year, it was happy to defer to executive-branch "expertise" when it sustained the Administration claim that the law allowed a gag rule on medical advice to pregnant women. But now the Court rejects, for the first time in the 27-year history of the Voting Rights Act, any Administration's interpretation of the act's scope.

The Court's distaste for civil rights laws has been evident at least since its decisions three years ago misinterpreting the job discrimination statute. Congress had to pass the 1991 Civil Rights Act to restore its meaning. The hostile justices are not only unchastened; they have gotten reinforcements. This decision and other radical activism may require yet another review by Congress and a restatement of civil rights law.

The new decision also contains a dose of reality for those who wanted to believe that Justice Thomas, a son of painful Southern segregation, could fill the shoes of Thurgood Marshall. When President Bush nominated him, he assured the Senate that his nominees follow the law but don't legislate from the bench. Even he may now be moved to ask himself, what kind of Court have I wrought?

BEST COPY AVAILABLE

A22 Wednesday, February 12, 1992

The Washington Post

The Washington Post

AN INDEPENDENT NEWSPAPER

The Reach of the Voting Rights Act

THE VOTING Rights Act requires that all covered jurisdictions obtain the approval of the Justice Department before making any changes in the laws affecting "voting qualifications or prerequisite to voting, or standard, practice or procedure with respect to voting." Traditionally the department and the Supreme Court have interpreted that language broadly. The court has held that it applies not just to such obvious nuts and bolts as voter qualifications, write-in rules and shifts from single-district to at-large elections, but to such subtler steps as converting an elective office to an appointive one.

Last year the court was asked to take what looked to be a logical next step and extend the law to cases where, instead of being made appointive, elective offices were neutralized by being stripped of previous functions and hollowed out. The Bush administration joined the plaintiffs in urging the court to approve the extension on grounds that to do less would be to countenance evasion and hollow out the Voting Rights Act as well. For the first time, however, the court disagreed with the Justice Department in construing the act and refused.

The majority said it had no choice, that to rule otherwise would be to exceed its authority, cross the divide between voting and governing and begin to apply the act not just to elections but to the many legislative and other outcomes to which the elections might lead. That might be a step for Congress to take, Justice Anthony Kennedy wrote, but not for the courts, which, once across the divide and without congressional guidance, would have no principled place to stop. He lathered up a vision of a world in which the courts and department would be involved in even the tiniest budget decision, since "the amount of funds available to an official has a profound effect on the power exercised," and "a vote for an ill-funded official is less valuable than a vote for a well-funded one."

But that's a false specter of a kind that this court has become all too famous for constructing in civil rights cases. It would be easy for a willing court to fashion a principled stopping point under which the department could enforce the act without going to extremes. Courts create such tests all the time. Indeed, the two Alabama cases here provided a partial basis.

In one of them, power was transferred from elected county commissioners to an appointed engineer in response to a corruption indictment years before the first blacks were elected to the commission. Even the dissenting justices conceded the transfer likely had a nondiscriminatory purpose (and although they still tried to bring it under the terms of the act, we think they failed). But the other was standard resistance in which the transfer occurred after the first black was elected. No mystery there, the dissenters said; the circumstances were "sufficiently suggestive of the potential for discrimination to demonstrate the need" for Justice Department approval.

There's a reasonable test that the country could live with. The Justice Department over the years has in fact already intervened on several occasions to save the threatened powers of black officials, and the republic has survived. A rigid, clerkish, fundamentally unsympathetic court has found and raised another problem where none needed to exist. In the process it has unnecessarily sent another issue back to Congress to be resolved.

BEST COPY AVAILABLE

Mr. PARKER. I think those editorial criticisms show that this decision is an anachronism, it is inconsistent with the trend of section 5 decisions for the past 27 years, and should be directly dealt with.

I disagree with Mr. Dunne. I don't believe that there is any serious problem in trying to get statutory language that would effectively overrule that decision. I think that the Solicitor General's brief suggests statutory language that could very easily be used. It is a very simple matter of covering transfers of decisionmaking authority from one official or set of officials to another official or set of officials, and possibly you would also want to include the issue of rulemaking authority since the procedural rulemaking also affects the powers of officials, and there have been cases of rulemaking involving racial discrimination.

The second case I would like to discuss is *West Virginia University Hospitals* v. *Casey,* in which the Supreme Court conclusively rejected precedent for the past 20 years or more in which expert witness expenses have been routinely awarded by the courts as part of attorneys' fees awards.

I have been litigating civil rights cases since 1968, many, many cases, and I cite some of the cases in my testimony. I can't recall a single case in which a court has rejected reimbursement of expert witness expenses as part of attorneys' fees award on this kind of ground. Now this lasted up until 1987.

In 1987, the Supreme Court handed down this other decision, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.,* and the circuit started to turn, but until that decision and the recent decision in *West Virginia University Hospitals,* it had been the routine practice of the courts to award expert witnesses as part of attorneys' fees, and I think it is fairly obvious.

Justice Scalia, in his opinion, took a very strict, literal interpretation. He says this is attorneys' fees, and the strict literal definition of attorneys' fees does not include expert witness fees, and I think that is profoundly erroneous, because it fails to recognize that there are really two definitions of what attorneys' fees consist of. There is the broad definition, and then there is the narrow definition.

The broad definition of attorneys' fees—and I think that this is reflected in the legislative history of this statute which was passed in 1976—the broad definition of attorneys' fees would include the fees and expenses which an attorney in private practice would normally bill his or her client for the legal services rendered, and I think there is no dispute, and it is even noted in Justice Scalia's opinion, that the usual practice of attorneys is to bill their clients for expert witness fees.

This is not something that is part of overhead; this is not something that is part of the hourly rate; this is something that attorneys normally bill their clients to cover, and that this is the definition of attorneys' fees that Congress was specifically adopting when it enacted this statute and also section 14(e) of the Voting Rights Act of 1965.

This case is a very serious setback. It contradicts a long line of Supreme Court decisions in which the Supreme Court has interpreted these statutes, these attorneys' fees statutes, based on the broad congressional purposes behind the law, the legislative history of the statute, court opinions cited in the legislative history as guides to the proper interpretation of the statute and how Congress intended the statute to be interpreted.

So this is a serious reversal. It is a setback in this particular area, and it represents an extremely adverse precedent. This decision has a very serious impact for those of us who are litigating voting rights cases today.

In preparation for my testimony, I prepared a list of the four cases that the Lawyers' Committee was involved in, the four voting rights cases that we were involved in, at the time the Supreme Court's decision was handed down, where we either had motions for court awards of attorneys' fees pending or we were engaged in settlement discussions over the award of attorneys' fees, and I would like to ask that that exhibit be made a part of the record as well.

Mr. **Edwards**. Without objection.

Mr. **Parker**. We have provided copies of this to you.

[The exhibit follows:]

LAWYERS' COMMITTEE EXPERT WITNESS EXPENSES IN VOTING RIGHTS CASES WHICH WERE DISALLOWED FOLLOWING THE SUPREME COURT'S WEST VIRGINIA UNIVERSITY HOSPITALS DECISION

Case	Total Litigation Expenses	Expert Witness Expenses
Collins v. City of Norfolk	$230,078.74	$146,838.49 (64%)
Miss. State Chapter, Op. PUSH v. Mabus	73,239.92	26,446.31 (36%)
Metro. Pittsburgh Crusade for Voters v. Pittsburgh*	35,248.47	16,197.49 (46%)
Willingham v. City of Jacksonville, N.C.*	7,472.01	5,490.00 (73%)
Totals	$346,039.14	$194,972.29 (56%)

*Case was settled prior to trial. In the Pittsburgh case the district court awarded attorneys' fees and expenses for only the remedy phase of the case, and not for trial preparation. The issue of plaintiffs' entitlement to attorneys' fees and litigation expenses for preparing for the trial are currently on appeal. Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, No. 91-3550 (3d Cir.).

Mr. **Parker**. We find that for the Lawyers' Committee, which is one organization, that we lost on the day the *West Virginia University Hospitals* decision was handed down—we lost about $195,000 of expert witness expenses that we had already paid, that we had incurred in these cases. These are just four cases.

We find from this chart that expert witness expenses constitute a very, very substantial litigation expense in these cases, not only the absolute figures but also as a percentage of the total litigation expenses, ranging from a low of 36 percent to a high in the 60's and 70 percent.

I think it is fair to say for most lawyers handling voting rights cases that expert witness expenses constitute the largest single out-of-pocket litigation expenditure required to be spent in litigating these cases.

In the case that is the most typical, *Collins* v. *City of Norfolk*, our expert witness expenses were approximately $147,000, 64 percent of the total litigation expenses. The other cases are less typical. One was a voter registration case, and two others were settled prior to trial.

So we see that expert witness expenses are very substantial, and to deny reimbursement of expert witnesses as part of attorneys' fees awards constitutes a very serious setback to voting rights litigation. Expert witness testimony is absolutely critical. You can't win these cases without it. I have seen decisions where the plaintiffs did not hire experts and they lost.

So in order to grant the fullest possible protections of the Voting Rights Act, I urge you to adopt legislation that would allow these expert witness expenses to be reimbursed.

Thank you.

Mr. **Edwards**. Thank you very much, Mr. Parker.

[The prepared statement of Mr. Parker follows:]

STATEMENT OF FRANK R. PARKER, DIRECTOR, VOTING RIGHTS PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, D.C.

Chairman Edwards and members of the subcommittee, thank you for inviting me to appear here today. I am Frank R. Parker, Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. The Lawyers' Committee is a national civil rights legal organization made up of members of the private bar who are fully committed to equal opportunities for minority Americans in voting, employment, housing, education, and other critical civil rights areas.

The Lawyers' Committee's Voting Rights Project litigates Voting Rights Act cases to secure equal voting rights for minority citizens around the country. I have been Director of the Voting Rights Project since 1981, and have personally litigated more than 50 voting rights cases. I am also author of a recent book on voting rights, Black Votes Count: Political Empowerment in Mississippi After 1965 (University of North Carolina Press, 1990), which has won five book awards, including top book awards of the American Bar Association, the American Political Science Association, and the Southern Political Science Association.

I am here today to testify regarding recent and onerous restrictions imposed by Supreme Court decisions on Voting Rights Act enforcement in two areas, the scope of Section 5 of the Voting Rights Act and recovery of expert witness expenses in voting rights litigation.

I. THE SUPREME COURT'S DECISION IN PRESLEY v. ETOWAH COUNTY COMMISSION

In Presley v. Etowah County Commission, decided January 27, 1992,[1] the Supreme Court for the first time adopted a restrictive view of Section 5 of the Voting Rights Act of 1965 that creates a serious loophole in Voting Rights Act coverage that allows covered states and political subdivisions to dilute the powers of minority officials once they win elective office.

Since the Voting Rights Act was passed by Congress 27 years ago, thousands of black, Hispanic, and other minority officials have been elected to office--in many states and localities for the first time in this century. The Supreme Court's decision has the potential for jeopardizing these momentous gains if covered jurisdictions are now permitted to adopt new laws that deprive these newly-elected minority officials of the political power exercised by their white predecessors without scrutiny by the Justice Department or the federal district court in Washington.

The controversy arose in two counties in Alabama, Etowah and Russell counties, that historically had elected members of their county commissions, the county governing boards, on an at-large, countywide basis. Because both of these counties are majority white, at-large voting diluted black voting strength and prevented any black candidates from winning election. Voting Rights Act lawsuits filed in the 1980s forced both of these counties to abandon at-large voting, subdivide the counties into single-member districts, and to elect county commissioners from these single-member districts. As a result the first black county commissioners were elected in 1986.

---

[1] 60 U.S.L.W. 4135 (U.S. Jan. 27, 1992).

But once elected, these black county commissioners found that they no longer had the power to build and maintain county roads and bridges in their own districts--power that had been exercised by each individual commissioner when the county commissions were all-white. In one county all the road and bridge money had been placed into a common fund, to be administered by the entire six-member, majority-white commission, and in the other county road and bridge authority was transferred to the county engineer, who was appointed by the entire, majority-white commission.

These changes had a severe adverse impact on the decision-making authority of these black commissioners. Traditionally, and particularly in rural areas, county road and bridge maintenance has been regarded as the primary responsibility of county commissioners. This district system gave individual commissioners substantial power and political leverage. It gave them patronage in the hiring of road crews, control over spending of road funds and the letting of contracts for road and bridge work in their districts, and the ability to provide direct services to their district constituents, who were expected to show their gratitude on election day. If the previous white commissioners had neglected the needs of the black voters in their district, for example, by refusing to pave unpaved roads in black neighborhoods, the district system gave the newly-elected black commissioners the power to redress that neglect.

The black commissioners filed lawsuits in federal district court challenging these changes under the Voting Rights Act. They contended that these new rules were changes in practices and procedures "with respect to voting," and that they could not be implemented without approval from the Justice Department or the U.S. District Court for the District of Columbia under Section 5 of the Voting Rights Act. The Justice Department agreed, and Solicitor General Kenneth W. Starr filed a brief in the Supreme Court contending that Section 5 covers a transfer of decision-making authority to other officials which has a potential for discrimination.

However, the Supreme Court, in an opinion by Justice Anthony M. Kennedy writing for a 6-to-3 majority which included Justice Clarence Thomas, adopted a restrictive view of Section 5 coverage. Justice Kennedy, writing that "the Voting Rights Act is not an all-purpose antidiscrimination statute,"[2] drew a distinction between changes relating to voting and the electoral process, which are covered, and changes relating to governance and the distribution of power among officials, which he held were not covered.[3]

Justice Kennedy also concluded that adopting a broader interpretation would threaten basic principles of federalism if the Voting Rights Act's "intrusive mechanisms" interfered with the decisions of state and local officials in structuring their governments.[4]

---

[2] 60 U.S.L.W. at 4140.

[3] Id. at 4138-40.

Justice John Paul Stevens, joined by Justices Byron White and Harry Blackmun, dissented. Justice Stevens concluded that a reallocation of decisionmaking authority that takes power from minority elected officials and transfers it to majority-controlled bodies has the same potential for discrimination against minority voters as racial gerrymandering of district boundaries or switching from district to at-large elections.[5]

The Supreme Court's decision in this case is a remarkable pronouncement that dramatically departs from prior precedent interpreting Section 5 of the Voting Rights Act. This is the first Supreme Court decision since the Voting Rights Act was passed in 1965 to limit the scope of Section 5 coverage and the first case in which the Supreme Court has rejected the Justice Department's interpretation of what is covered by Section 5.[6]

Section 5 was adopted as part of the original Voting Rights Act in 1965 to prevent covered states and localities from adopting new voting laws to nullify or dilute the voting power of newly-enfranchised minority voters. The statute requires covered jurisdictions, before implementing any change in voting laws, to submit that change for preclearance by the Justice Department or the U.S. District Court for the District of Columbia, and places on the submitting jurisdiction the burden of proving that the change is not racially discriminatory in purpose or effect.

---

[4] Id. at 4140.

[5] Id. at 4140-45.

[6] In the past, the Supreme Court has ruled that the Justice Department's interpretation of Section 5 is entitled to "considerable deference." NAACP v. Hampton County Election Commission, 470 U.S. 166, 178-79 (1985). See also, Perkins v. Matthews, 400 U.S. 379, 390-91 (1971); United States v. Sheffield Board of Commissioners, 435 U.S. 110, 131 (1978); Dougherty County Board of Education v. White, 439 U.S. 32, 39 (1978).

The Supreme Court in Allen v. State Board of Elections[7] in 1969, relying on Congress's intent as revealed by the legislative history of the statute, adopted the most expansive interpretation of Section 5 coverage. The Court ruled that Section 5 covered not only changes in voter registration and voting procedures, but any change affecting the weight, power, or effectiveness of minority voters' votes. Since then, the Supreme Court has reaffirmed the broad scope of Section 5 coverage and has interpreted Section 5 expansively to include any device that would interfere with or dilute minority voting power.[8] Following the Supreme Court's lead, several lower courts had ruled that Section 5 covered transfers of decisionmaking power that have the potential for discrimination against minority voters.[9]

---

[7] 393 U.S. 544 (1969).

[8] See, e.g., Hadnott v. Amos, 394 U.S. 358 (1969) (increasing candidate qualifying requirements); Perkins v. Matthews, 400 U.S. 379 (1971) (changes in polling places); City of Richmond v. United States, 422 U.S. 358 (1975) (municipal annexations); Georgia v. United States, 411 U.S. 526 (1973) (redistricting plans); Lockhart v. United States, 460 U.S. 125 (1983) (numbered posts and staggered terms); City of Pleasant Grove v. United States, 479 U.S. 462 (1987) (annexation of vacant land).

The Presley decision reverses this important trend of providing the broadest possible protections against changes adversely affecting minority voting rights and adopts a cramped and artificial construction of Section 5 that threatens gains made over the past 27 years. The purposes of the Voting Rights Act are defeated when, just as minority officials begin to win office in significant numbers, the political power of those offices is diluted and transferred to majority-white bodies or white officials who are not accountable to minority voters.

There is broad support for the view that the Presley decision is an anachronism and should be corrected. The New York Times criticized the Supreme Court's decision, saying that the majority "shows contempt for precedent, disrespect for Congress and indifference even to the arguments of this conservative Administration." "No act of Congress in this generation has earned or received more respect," the New York Times wrote of the Voting Rights Act. "Yet the Court casually accepts evasions of its purpose, casting aside a whole body of Federal lawmaking aimed at forcing white majorities to share political power with minorities."[10] Similarly, the Washington Post expressed its opposition to the decision and contended, referring to the Supreme Court majority's argument that it would be difficult to define the scope of Section 5 on governance issues: "A rigid, clerkish, fundamentally unsympathetic court has found and raised another problem where none needed to exist. In the process it has unnecessarily sent another issue back to Congress to be resolved."[11]

---

[9] Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978) (statute providing for election of officials formerly appointed by the Governor); Hardy v. Wallace, 603 F. Supp. 174 (N.D. Ala. 1985) (statute switching appointment of county racing commission from legislative delegation to Governor); County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983) ("home rule" statute transferring legal power over local affairs from Governor and legislature to at-large elected county council); Robinson v. Alabama State Department of Education, 652 F. Supp. 484 (M.D. Ala. 1987) (transfer of authority from countywide elected school board to school board appointed by city council).

To the extent that such an amendment does not jeopardize the extension of Section 203 of the Act, which has the highest priority, I recommend that the Subcommittee consider an amendment to Section 5 of the Act that makes explicit Congress's intent to include a transfer of decisionmaking authority from one official or set of officials to another official or set of officials within the coverage of the preclearance requirement of Section 5 of the Voting Rights Act.

II. THE SUPREME COURT'S DECISION IN WEST VIRGINIA UNIVERSITY HOSPITALS v. CASEY

The Supreme Court in another recent decision severely undermined Voting Rights Act enforcement when in West Virginia University Hospitals, Inc. v. Casey[12] it held that expert witness expenses incurred in enforcing civil rights statutes through litigation are not recoverable under civil rights attorneys' fees statutes.

---

[10] Editorial, "The Runaway Supreme Court," The New York Times, Feb. 2, 1992, p. 16.

[11] Editorial, "The Reach of the Voting Rights Act," The Washington Post, Feb. 12, 1992, p. A22.

[12] 113 L.Ed.2d 68 (1991).

In extending the Voting Rights Act in 1975, Congress amended Section 14 of the Act to give federal courts authority to award prevailing parties in voting rights litigation "a reasonable attorney's fee as part of costs."[13] One year later, Congress adopted the Civil Rights Attorneys' Fees Award Act of 1976 to provide for court awards of attorneys' fees as part of costs in a broad range of civil rights litigation.[14] The purpose of both statutes was to provide for the full reimbursement of the reasonable litigation expenses of civil rights litigants who might not otherwise be able to vindicate their federally-secured equal civil rights because of the expense of litigation.

However, in West Virginia University Hospitals, Inc. v. Casey the Supreme Court, by a 6-3 majority, severely undermined the congressional purposes behind these statutes. The Court ruled that the Civil Rights Attorneys' Fees Award Act did not authorize district courts to award prevailing parties their expert witness expenses, which in civil rights litigation today constitute a substantial portion of the litigation expenses. Because this statute and Section 14(e) of the Voting Rights Act have similar language and purposes, courts have given them the same interpretations, and consequently the Supreme Court's decision also affects litigation under the Voting Rights Act.

---

[13] 42 U.S.C. Section 1973l(e).

[14] 42 U.S.C. Section 1988.

The majority, in an opinion by Justice Antonin Scalia, adopted a strict rule of literal statutory construction and held that that words "attorney's fees" do not include expert witness expenses. The majority rejected arguments based on cases decided prior to 1976 in which expert witness expenses were awarded as part of attorneys' fees, the cases specifically referred to in the legislative history of the statute in which expert witness expenses were awarded, and the congressional purpose behind the statute to provide a full judicial remedy.

Justice John Paul Stevens, joined by Justices Marshall and Blackmun, dissented. They contended that Justice Scalia's method of statutory construction contradicts the approach the Court has employed in prior cases in interpreting the statutory text of this statute and its legislative history. In criticizing the majority's approach, Justice Stevens referred to the numerous recent occasions in which the Supreme Court's strictly literal interpretation of statutes has contradicted the available evidence of congressional purpose and prior cases and in which Congress has been required to repudiate the Court's interpretation by enacting statutes reversing the Supreme Court's decisions.[15] The dissent closed with an implicit invitation to Congress to do the same thing here: "In the domain of statutory interpretation, Congress is the master. . . . Only time will tell whether the Court, with its literal reading of § 1988, has correctly interpreted the will of Congress with respect to the issue it has resolved today."[16]

---

[15] 113 L.Ed.2d at 91-93.

The Supreme Court's opinion is serious setback in that it contradicts a long line of Supreme Court decisions in which the Court relied on the broad congressional purposes behind the law, the legislative history of the statute, and court opinions cited in the legislative history as controlling authority for how Congress intended the statute to be interpreted.[17] Further, the Supreme Court's decision is a startling new interpretation of provisions for court awards of attorneys' fees. I have been litigating civil rights cases since the late 1960's and am intimately familiar with the courts' practices concerning expert witness expenses. Historically, in awarding attorneys' fees to the prevailing parties in civil rights cases, courts have routinely reimbursed prevailing plaintiffs for their expert witness expenses as part of attorneys' fees awards.[18]

---

[16] Id. at 93, 94 (footnote omitted).

[17] See, e.g., Missouri v. Jenkins, 491 U.S. 274 (1989); City of Riverside v. Rivera, 477 U.S. 561 (1986); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

[18] See cases cited, 113 L.Ed.2d at 89-90. For voting rights cases in which prevailing plaintiffs were awarded their expert witness expenses, see Jordan v. Allain, 619 F. Supp. 98, 115 (N.D. Miss. 1985); Kirksey v. Danks, 608 F. Supp. 1448, 1459 (S.D. Miss. 1985); Connor v. Winter, 519 F. Supp. 1337, 1345 (S.D. Miss. 1981); Fairley v. Patterson, 493 F.2d 598, 606-07 (5th Cir. 1974); Sims v. Amos, 340 F. Supp. 691, 695 (M.D. Ala. 1972).

Most circuits began to disallow the award of expert witness expenses following the Supreme Court's decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), even though that decision involved only the narrow issue of whether expert witness expenses above the statutory amount were allowed

As applied to voting rights litigation, the Court's decision has a severe detrimental impact on the ability of plaintiffs in voting rights cases to challenge racially discriminatory voting laws under the Voting Rights Act. Most voting rights cases today--including challenges to at-large voting as well as racial gerrymandering of district lines--are litigated under the legal standard established by the Supreme Court in Thornburg v. Gingles.[19] In Gingles the Supreme Court set forth three primary elements of proof to show unlawful minority vote dilution: (1) Is the minority group sufficiently large and geographically compact to constitute a majority in a single-member district?; (2) Are minority voters politically cohesive, that is, do they bloc vote for particular candidates?; and (3) Does the white majority vote sufficiently as a bloc to enable it--in the absence of special circumstances--usually to defeat the minority's preferred candidate?[20]

Obviously, expert witness testimony is necessary to prove all three elements. Plaintiffs must retain a demographic expert familiar with Census data and maps to draw a new redistricting plan to determine whether a majority black, Hispanic, or other minority district can be drawn. Further, plaintiffs must retain one or more expert social scientists or statistical experts to conduct computer-based analyses to determine whether or not there

---

under 28 U.S.C. § 1920 and 28 U.S.C. § 1821(b).

[19] 478 U.S. 30 (1986).

[20] 478 U.S. at 50-51.

is racially polarized voting that usually results in the defeat of minority-preferred candidates.

In Gingles the Supreme Court, relying upon the legislative history of the statute, prior cases, and commentary, indicated that proof of racial bloc voting "is a key element of a vote dilution claim."[21] Consequently, most voting rights cases today are, in large part, a battle of expert witnesses. Plaintiffs' experts come to court and testify that the election results show that minority voters are politically cohesive and that minority-preferred candidates usually are defeated by white bloc voting. Defendants also bring their experts to court to testify that the statistical analyses of plaintiffs' experts are inappropriate or methodologically flawed or don't prove what they purport to prove, and that there is no proof of racially polarized voting. Voting rights plaintiffs who fail to utilize expert witnesses to prove their case stand a strong chance of losing.

Economically, there is a significant disparity of resources between plaintiffs' and defendants' abilities to mount these battles of the experts. In the most significant voting rights cases today, the plaintiffs are minority voters with few resources to finance such litigation who often are represented by public interest groups with comparatively limited resources, while the defendants in these cases are states, counties, or cities who can finance their side of the litigation through the public treasury.

---

[21] Id. at 55.

Further, the necessity of relying upon expert witness testimony to prove the key elements of voting rights cases makes these cases extremely expensive to litigate. Prevailing plaintiffs' inability to recoup expert witness expenses as a result of the Supreme Court's West Virginia University Hospitals decision is extremely damaging to ongoing efforts to fulfil the promise of the Voting Rights Act.

On the day the Supreme Court's decision was handed down, my organization had motions for court awards of attorneys' fees and litigation expenses pending, or was attempting to settle the fees issue, in four pending voting rights cases. As a result of the Supreme Court's decision, that day we lost $195,000 in out-of-pocket expenses that we had paid for expert witness testimony in those four cases, which constitutes about 30 percent of the Voting Rights Project's annual budget. In addition, the Court's decision deprives us of the opportunity to seek reimbursement for more than $100,000 of expert witness expenses incurred in other cases which had not yet gone to final judgment and in which we had not yet filed an attorneys' fee motion. This type of loss seriously undermines the ability of voting rights plaintiffs and public interest organizations to challenge racially discriminatory voting rights laws.

Last year in the Civil Rights Act of 1991, Congress amended 42 U.S.C. § 1988 to provide for court awards of expert fees as part of attorneys' fee awards in cases brought pursuant to 42 U.S.C. § 1981, and also amended Section 706(k) of the Civil

Rights Act of 1964 to include expert fees as part of attorneys' fees in cases brought pursuant to Title VII of the Civil Rights Act.[22] This legislation now allows awards of expert witness expenses in employment discrimination litigation, but does not reach voting rights litigation, which is equally, if not more, dependent on expert witness testimony.

I urge this Subcommittee to fill this gap by amending Section 14(e) of the Voting Rights Act by providing for court awards of expert fees and other litigation expenses as part of attorneys' fees.

Thank you for giving me the opportunity to testify here today and to present my views.

---

[22] Section 113, P.L. 102-166, 102d Congress, 105 Stat. 1079.

Mr. EDWARDS. Abigail Thernstrom is an author from Lexington, MA. Ms. Thernstrom has written extensively in the area of civil rights and specifically voting rights. Her publications include: "Whose Votes Count: Affirmative Action and Minority Voting Rights" and "The Voting Rights Trap."

You are welcome, and you may proceed. Without objection, your full statement is a part of the record.

STATEMENT OF PROF. ABIGAIL THERNSTROM, BOSTON UNIVERSITY

Ms. THERNSTROM. Thank you, Mr. Chairman, and thank you for inviting me.

I think I ought to add, just because the university would be unhappy if I didn't, that I am an adjunct professor at Boston University.

I'm going to talk exclusively today about the *Presley* decision and not address the other issues. That is, I'm going to address the question: Should Congress alter the Voting Rights Act to modify or overturn the decision in *Presley* v. *Etowah County?*

The *Presley* decision, in my view—obviously, a view that is very different from Frank Parker's—amounts to nothing more than low-level common sense. The Supreme Court simply said, "Hey, this is an act about voting, not about the distribution of authority among office holders." Job descriptions change over time inevitably; one year's sensible allocation of power is another year's disastrous inefficiency.

True, some changes in the operation of an elected body may reduce the power of an office held at that particular moment by an African-American, but that is not a change in voting practice or procedure within any reasonable definition of the term, and if it was, voting section attorneys and paralegals would assume, in my view, a literally unmanageable task. They would have to fashion the impossible: Clean administrative rules of thumb to distinguish the routine and the sensible change in the powers of an office from that which is suspect, or they would have to judge the precise and the often subtle impact of a particular change in the definition of an office in a jurisdiction about which they know next to nothing.

Those were the Court's basic points, as I read the decision. It could have, in my view, added another. It could have said neither black nor white elected officials are permanently entitled to precisely the authority they hope to exercise in initially running for public office. Such an entitlement would turn a democratic process into a rigid arrangement without that fluidity, that openness to change that keeps democracies democratic.

Well, some would argue that it is really too late to suggest that voting rights should mean voting rights. After all, a districting plan that contains 10 majority black districts when an 11th really could be drawn would hardly seem to constitute a voting rights violation as Congress understood the phrase in 1965 or as most ordinary people would understand the phrase today, and that is true, we have gone very far down an unanticipated definitional road. Nevertheless, to overturn the *Presley* decision would involve a radical and unwarranted new expansion of the meaning of the right to vote.

In the enforcement of the Voting Rights Act, a combination of misguided administrative rules of thumb and excessive subjectivity in judging the interplay, the complicated interplay, between race and politics in jurisdictions remote from Washington is already a severe problem.

The Justice Department, which invents and reinvents the law as it goes along, has refashioned section 5. It asks question inappropriate to the provision, it relies on bureaucratic formulas that don't address the issue at hand, and it resorts to comparing electoral schemes by conducting crude racial head counts packaged in a lot of methodologically dubious statistical mumbo-jumbo purporting to discern racial polarization.

In other words, faced with the insurmountable task of judging the complicated interplay of race and politics in a jurisdiction remote from Washington, the Justice Department resorts to a rule of thumb that would never be legislatively sanctioned, the entitlement of black and Hispanic voters to a maximum number of safe black and Hispanic legislative seats, within the constraints of single-member districting schemes a right to proportionate racial and ethnic representation.

Such statistical rules of thumb and racial head counts are inevitable, as the enforcement of section 2 since 1982 has amply demonstrated, and if *Presley* is overturned, as in other aspects of voting rights enforcement, stock phrases and crude formulas will substitute for close analysis.

Finally—I have obviously very abbreviated my statement here to keep within the time—finally, needless to say, protection of course must be provided against racist State action, and we have the 14th amendment with which to do so, but we cannot take care of every potential wrong involving race with administrative oversight.

Indeed, to allow a process of Federal administrative review to monitor every change in the allocation of authority on a governing body would be to permit excessive intrusion upon constitutionally sanctioned local prerogatives.

Section 5, by all accounts, remains a drastic provision. It was originally seen, it is important to recall, as a 5-year emergency measure. The burden of the jurisdiction is to prove the racial neutrality of its action beyond any doubt. Thus, the provision entails a radical shift in Federal-State relations. By dictating the distribution of power on an elected body, a section 5 objection would override democratically arrived at decisions about the powers of members of an elected body. To do so on the basis of suspected discriminatory impact, it would seem to me, would strain the bounds of constitutionality, and certainly the intrusiveness of such power strains, in my view, the bounds of wisdom.

Thank you very much.

Mr. EDWARDS. Thank you very much.

[The prepared statement of Ms. Thernstrom follows:]

STATEMENT OF PROFESSOR ABIGAIL THERNSTROM, BOSTON UNIVERSITY.

Thank you for inviting me to testify today. My name is Abigail Thernstrom. I am a political scientist, with an adjunct professorship at Boston University. I am also the author of a book on the Voting Rights Act entitled _Whose Votes Count? Affirmative Action and Minority Voting Rights_, which was published by Harvard University Press in 1987 and which won four coveted awards, including one from the American Bar Association and another from the Policy Studies Organization, an affiliate of the American Political Science Association. More recently, with assistant secretary of education, Diane Ravitch, I have edited a book entitled _A Democracy Reader_, which, through classic statements of democratic thought, explores the meaning of representative government. I am a frequent contributor to _The New Republic_ and other journals of public affairs.

The issue before this committee today, as I understand it, is whether Congress should (once again) amend the Voting Rights Act to expand the meaning of the term "voting rights" in order to ensure that black ballots "fully count"--that they carry their "proper" weight. More specifically: should Congress alter the Voting Rights Act to modify or overturn the recent decision of the United States Supreme Court in the case of _Presley v. Etowah County_?

The _Presley_ decision, in my view, amounts to nothing more than low level common sense. In a nutshell, the Supreme Court simply said, hey, this is an act about voting, not about the distribution of authority among officeholders. Job descriptions inevitably change over time; one year's sensible allocation of power is another year's disastrous inefficiency. It is true: some changes in the operations of an elected body may reduce the power of an office held, at that moment, by an African-American. But that is not a change in a "voting" practice or procedure within any reasonable definition of the term. And even if it was, such an expansion of the Justice Department's authority under section 5 of the act would impose upon voting section attorneys and paralegals a literally unmanageable task. They would have to fashion the impossible: clean administrative rules of thumb to distinguish the routine and sensible change in the powers of an office from that which is suspect. Or they would have to judge the precise and often subtle impact of particular changes in the definition of an office in a jurisdiction about which they know next to nothing. Those were the Court's basic points, as I read the decision. But it could have added another: neither black nor white elected officials are permanently entitled to precisely the authority they hoped to exercise in initially running for office. Such an entitlement would turn a democratic process into a rigid arrangement without that fluidity--that openness to change--that keeps democracies democratic.

Those on and off the Court who disagree with the Presslev decision implicitly argue that it is really too late to argue that voting rights should mean voting rights. After all, districting plans that contain ten majority-black districts when an eleventh could be drawn would hardly seem to constitute a "voting" rights violation as Congress understood the phrase in 1965--or as most ordinary people would today. And that's true: we've gone far down an unanticipated definitional road. But to overturn the Presley decision would involve a such a radical new expansion of the meaning of the right to vote as to make the previous definitional games that Congress has ignored (sometimes for good reason, sometimes not) look comparatively harmless.

I have suggested that federal legislation tinkering with the Pressley decision would result in some combination of misguided administrative rules of thumb and excessive subjectivity in judging the interaction between race and politics in jurisdictions remote from the Washington scene. That combination is already a problem in the enforcement of the Voting Rights Act. Section 5 was intended as an anti-backsliding provision; the Department of Justice, as a surrogate court, was supposed to ask only one quite straightforward question: has the voting change in question left black voters worse off than before? Thus redrawn districting lines that once provided for five "safe" black legislative seats and now provide for only two were considered a clear violation of section 5.

That is the only reading of section 5 that the Supreme Court has sanctioned, but in the hands of the Justice Department, which invents and reinvents the law as it goes along, that provision has been refashioned. Thus in fulfilling its preclearance responsibilities, Justice Department staff, relying on a very dubious combination of sections 5 and 2, is asking a question that cannot be answered except (as the Supreme Court noted in a landmark voting rights case) with an intensely local appraisal--the sort of appraisal that can be conducted only in the context of a trial in a local federal district court. The department is asking: what is the level of electoral opportunity for black voters in the state or locality in question? Do blacks and whites stand on equal electoral footing? Are black voters without the opportunity to elect candidates of their choice?

This is precisely the sort of subtle question that Washington bureaucrats are ill-equipped to answer. And of course in their attempt to do so, faced with a very large number of section 5 submissions, they rely on bureaucratic formulas that don't address the issue at hand. Thus, the question has been changed from one of electoral opportunity to one of result, and in assessing result, the department has resorted to comparing electoral schemes by conducting crude racial headcounts, packaged in a lot of statistical mumbo jumbo purporting to discern racial polarization when in fact polarization turns out to exist wherever the department wants to find it.

In other words, faced with the insurmountable task of judging the complicated interplay of race and politics in a jurisdiction remote from Washington, the Justice Department has resorted to a rule of thumb that would never be legislatively sanctioned: the entitlement of black and Hispanic voters to a maximum number of "safe" black and Hispanic legislative seats. Within the constraints of single-member districting schemes, a right to proportionate racial and ethnic representation.

Such statistical rules of thumb and racial headcounts are inevitable. In 1982 those who urged the amendment to section 2 said they wanted nothing radical and new--just a return to the constitutional standard prior to the 1980 decision in City of Mobile v. Bolden. They wanted to reach, as the distinguished voting rights attorney Armand Derfner put it, electoral discrimination in those rare jurisdictions in which "racial politics...dominate the electoral process." They wanted to get at those highly unusual situations in which the political processes were "frozen" and minorities voters had no influence--"nothing." Situations in which voters of a racial minority were "shut out, i.e. denied access...[without] the opportunity to participate in the electoral process." The majority of the members of Congress took these proponents at their word, turning a deaf ear to those who warned that the consequence of a results test would be statistical rules of thumb that amounted to an entitlement to proportionate racial and ethnic representation. In fact, however, as those critics stated at the time, such statistical rules became essential if the effects tests were to become administratively manageable. Voting section procedures cannot substitute for a trial; the staff cannot gather the specific, detailed knowledge that only a court can obtain. If Pressley is overturned, once again, stock phrases and crude formulas will substitute for close analysis.

Needless to say, protection must be provided against racist state action, and we have the Fourteenth Amendment with which to do so. But we can't take care of every potential wrong involving race with administrative oversight. Indeed, to allow a process of federal administrative review to monitor every change in the allocation of authority on a governing body would be to permit excessive intrusion upon constitutionally sanctioned local prerogatives. Section 5, by all accounts, remains a drastic provision. It was originally seen as a five-year emergency measure. The burden is on the jurisdiction to prove the racial neutrality of its action beyond any doubt. Thus the provision entials a radical shift in federal-state relations. By dictating the distribution of power on an elected body, a section 5 objection would override democratically arrived at decisions about the powers of members of an elected body. To do so on the basis of suspected discriminatory impact would seem to strain the bounds of constitutionality. Certainly the intrusiveness of such power strains the bounds of wisdom.

Mr. **Edwards**. Mr. Conyers.

Mr. **Conyers**. Oh, I wouldn't even try to beat this one. Real nice—real nice, you know. That is what we have come to in this country—you know, the fine tuning—and from Boston yet, from where they make the Patriot missile, if I remember correctly.

But, you know, this is so painful. I'm used to the people in the part of the country coming up here telling us why they have got to maintain the system, why voter rights and civil rights were all wrong, and now look where we are getting it from. Brilliant analysis, lay out the cases. Practical result: Cut back the rights; and, as a matter of fact, the Congress, we have gone way beyond it. Instead of us encouraging the Department of Justice and the Civil Rights Division, we say, "Oh, they have just"—you were here when this law was made. That wasn't a reflection of the chairman's view about Justice going wild. I was here. I happen to know what congressional intent was.

No, I'm not going to touch that one—me and her arguing about all the law she has prepared, and lectured on, and taught for all these years—no way.

Ms. **Thernstrom**. I don't know whether that calls for a reply or not. I mean the only thing I would say in reply is, I think in general on public policy in this country both on the left and the right there is excessive hysteria; we ought to lower the decibel level and talk about complicated issues of public policy upon which people of integrity can disagree, and we ought to talk about them in a voice of mutual respect.

Mr. **Conyers**. Well, the left and the right—the left and the right ought to do that. I'm in the Congress, I don't know where I fit on that screen, but I'm glad that that is the perspective that you use in trying to figure this out—the left and the right.

Mr. **Edwards**. We are going to have to recess for 5 to 10 minutes because there is a vote in the Chamber of the House of Representatives, so we will have a brief recess and then we will return.

[Recess.]

Mr. **Edwards**. The subcommittee will come to order, and when Mr. Conyers returns we will give him time.

Mr. Hyde, do you have questions?

Mr. **Hyde**. Well, I don't want to ask questions that we know the answers to, but in 1975 and in 1982 Congress voted to require covered jurisdictions to provide multilingual voting materials under section 203; we know that; that is why we are here.

In your view, has there been a showing of voting discrimination which would warrant an extension and expansion of this provision?

Mr. Parker.

Mr. **Parker**. Mr. Hyde, the thrust of my testimony was not to the extension of section 203 of the Voting Rights Act, and some of the other organizations are more knowledgeable on section 203 issues, and this is not something that we deal with on a day-to-day basis. But our position is yes, that a sufficient showing of discrimination has been made, that the extension of section 203 is necessary to open up the voter registration and voting process to persons whose first language is not English.

Mr. **Hyde**. Well, I just want to say, more than for the record, we are looking for that evidence.

Frankly, Federal intervention in local voting procedures and the process is radical. We knew that when we first passed the law, and I think radical situations call for radical measures, I don't disavow that, but I still think we have to be mindful of the need for sufficient justification, and I have heard opinions expressed, including from Mr. Dunne, but we have yet to see hard data that show that there is sufficient discrimination in voting to warrant its extension, and I continue to look for that.

Let me ask another question, and this has nothing to do with the two cases that you spoke about but just on your general expertise, and, Ms. Thernstrom, I would ask this question of you, too.

The gerrymandering—we have been taught gerrymandering is an evil, it is something we all look at with contempt, not all the time. The gerrymandering of congressional districts has really reached new dimensions.

We have an earmuff district in Illinois very close to my own district where two Hispanic communities are joined by a sliver to make them a district. Compact, contiguous, they are not. Then we have the famous I-85 minority district in North Carolina so narrowly drawn, it has been said if you drive through the district with the doors of your car open you will kill all the voters.

Rather than eliminating invalid considerations of race, we seem to be specifically imposing racial considerations into the electoral process by requiring that congressional districts be drawn to elect minority politicians.

Now is it your opinion—and I ask both of you, Mr. Parker first—is this gerrymandering of congressional districts along racial lines in keeping with the purpose and scope of the Voting Rights Act and, for that matter, the Constitution of the United States?

Mr. PARKER. No, Mr. Hyde, it is not my opinion that that is racial gerrymandering.

A generally accepted definition of gerrymandering is that this is discriminatory line drawing by the party in power to dilute or negate the votes of their opposition, and so this is line drawing not to benefit the party in power against their political opponents, but this is line drawing to benefit a historically disenfranchised minority that are discriminated against and underrepresented in the existing process and need to have a voice and need to comply with the mandate of section 2 of the Voting Rights Act to give them an opportunity to elect candidates of their choice where that opportunity has been denied.

We were happy to be coplaintiffs with some of your colleagues—Mr. Hastert and others—in the Illinois congressional redistricting case, and I think one of the important aspects of that case is that all the plaintiffs—there were five lawsuits in that case—Mr. Hastert and some of your Republican colleagues from Illinois. Maybe you were a plaintiff.

Mr. HYDE. I was indeed.

Mr. PARKER. You were a plaintiff in that case as well?

Mr. HYDE. I was indeed. I greet you with unclean hands.

Mr. PARKER. And we represented the Chicago Urban League in the Chicago Urban League lawsuit, and I think one of the beneficial aspects of that lawsuit is that all of the plaintiffs were able to agree on the districts, the three majority black districts and the one Hispanic district for Chicago.

Mr. **Hyde**. Indeed, that was our launching pad.

Mr. **Parker**. Yes.

Mr. **Hyde**. We understood that we had to provide districts and try to approximate 65 percent of minority population or the courts would reject the map. So you get a race of diligence to see who can provide the stronger minority districts.

Mr. **Parker**. That is right.

Mr. **Hyde**. Which in one sense is a happy result of the way the law has developed. But I still am not comfortable with the notion. I am understanding and support the notion that Hispanics should have a chance to elect a Hispanic to represent them, but I will reject the notion that only a Hispanic can well represent Hispanic interests any more than Irish and black and native Americans, et cetera. But there are two conflicting notions, and they are both valid.

Mr. **Parker**. I think the shapes come—I mean I was glad that all the plaintiff groups in the five lawsuits were able to agree on all those districts, even though the shapes did seem to be somewhat irregular.

But the element I think we have to recognize which is present here is that, to some extent, political expediency also plays a role, and there is a desire to preserve the incumbents to the extent possible, a desire to give a voice to minority groups, and I think that is the consequence of what results from the shape of those districts, not only to give minorities a voice but also to satisfy certain political agendas which either the litigants in the lawsuit or the State legislatures are attempting to satisfy.

So to answer your question, no, it is not gerrymandering; and, second, I think the result of those districts will be to bring minority representation to Congress in levels that have not existed in the past and to remedy the underrepresentation. That doesn't necessarily mean that those minority districts will necessarily elect minority Members of Congress. Some of them have not in the past. I think the trend now is more in the other direction. But I think that this will give blacks, Hispanics, and other minorities more representation in Congress than they have in the past and correct a severe underrepresentation.

Mr. **Hyde**. Ms. Thernstrom.

Ms. **Thernstrom**. Well, in the first place, Mr. Hyde, yes, it is gerrymandering, or, as the Wall Street Journal has recently called it, segremanding—I don't think it is a bad term—and it has, as you suggested, I think, reached new heights, and, also as you suggest, I think it is based on a very unfortunate assumption that only black office holders can properly represent black voters, only Hispanic office holders can properly represent Hispanic voters, and, by extension, only whites can properly represent whites.

It also, in my view, confuses office holding with representation, and often representation—because, after all, in my view, blacks can be represented by whites and whites by blacks—often representation, in my view, or sometimes, at least, representation, in my view, depending on the precise context, the precise circumstances, is indeed enhanced by less in the way of racial gerrymandering—

that is, to not create these Jim Crow districts but indeed, let's say, to create rather than one Jim Crow district two districts in which blacks are the swing vote and which, whether white—whoever gets elected, whether white or black, is beholden to those black voters and must be responsive to them gives blacks much more in the way—depending again on the context, it can give blacks much more in the way of representation although it does not guarantee them office holding, and, of course, black candidates and black office holders like safe districts precisely because they are safe.

I think there is a final message, and I think you, yourself, hinted at it, and it is actually related to the bilingual ballot question as well a bit, and that is, I think that this kind of racial gerrymandering builds into our public law, into our public policy, a very, very unfortunate message that we are not one nation but separate nations defined by race and ethnicity, that it is only the lines of race and ethnicity that define us so that for all purposes I am a white voter, I'm not a suburban voter, I'm not—or, for paramount purposes, I'm not a female voter, I'm not a middle-aged voter, I'm not a mother voter, but I am a white voter, and that is the most important thing to say about me, and I think that notion of separatism in this society increases—enhances the prospects of racial polarization, drives us precisely in the wrong direction toward—I mean obviously in many respects we are already a racially divided society. We want to walk forward on that score and not backwards, and I think that this kind of public policy walks us backwards.

Mr. HYDE. I have always been troubled—my political years were in the Illinois State Legislature when busing was the hot button item, but there was an idea that if you integrated society people would learn about each other, like each other, tolerate each other, not fear each other, and we would have a better society, and yet when I got into reapportionment politics the thrust was all centrifugal, it was all pack as many together in one community as possible rather than centrifugally send people out. Both are regnant philosophies still, and I stand somewhat in the middle, bewildered.

Ms. THERNSTROM. I would add to that, it also creates incentives for the perpetuation of segregated housing, because you don't want——

Mr. HYDE. You don't want to lose your 65 percent.

Ms. THERNSTROM. Exactly.

Mr. HYDE. Sure. That is right. And pretty soon we will have castles with moats.

Ms. THERNSTROM. And I would also add that I think kind of across the board we are delivering a separatist message. I mean the notion now of all-black schools, I can't believe that we are back—having watched the enormous progress we have made, that we are back to talking about the benefits of all-black schools. It is dismaying to me.

Mr. HYDE. Well, I agree.

I will compliment your State, because—of course, I was going to say that Senator Brooke was a popular Senator while he was in office and represented the State of Massachusetts well. Gary Franks from Connecticut has a largely white district and is doing a fine job; and, of course, in my area, while I do not support her party nor much of her position, the victory of a black woman was a victory for interracialism rather than segregation.

Ms. THERNSTROM. Absolutely.

Mr. HYDE. So I think we can make progress if we don't sanctify segregation under whatever rubric.

Ms. THERNSTROM. I agree.

Mr. HYDE. So I do thank you.

Thank you, Mr. Chairman.

Mr. EDWARDS. Back in the early eighties when it was time to bring up to date the Voting Rights Act, Mr. Hyde and I and Harold Washington, who later became the mayor of Chicago, we traveled extensively and held hearings throughout Texas, throughout Alabama, and other States, as I remember. As a matter of fact, I remember with nostalgia that we sat having lunch in Birmingham, AL, at an exclusive businessman's club that, of course, had been segregated strictly for many years. The Civil Rights Act of 1964 had made it possible for then Congressmen Washington to sit with us in dignity in that luncheon room.

Do you remember that, Mr. Hyde?

Mr. HYDE. Mr. Chairman, not only do I remember that, but we were talking to a U.S. court of appeals judge at luncheon, a prominent one, and we got into a discussion, and I uttered my usual conservative thought that the courts ought to not ever legislate, they should adjudicate, and he said that is true, but he said, "Sometimes we have to legislate," and I said, "Like when?" and he said, "Reapportionment." He said, "When the State legislatures won't do it and it isn't getting done, then justice requires that we do it." And I must say that I was persuaded that it is true that the State legislatures, for all kinds of good reasons, achieve maximum gridlock over trying to draw lines to satisfy people, and the courts, had they not intervened—and it is nothing I am thrilled about or happy about, but I do think it was absolutely necessary if we were to have modern districts that actually reflect the population.

So I remember that luncheon for that reason as well.

As I recall, you picked up the check.

Mr. EDWARDS. That was a first and a last—a first and a last.

Mr. HYDE. And if you didn't, you should have.

Mr. EDWARDS. Well, thank you.

But in Texas especially we found the gerrymandering was absolutely outrageous. There was no way for—they called them Mexican-Americans then, or worse, in Texas, and that is why we crafted section 5, actually so that these political changes of districts and gerrymandering would be slowed down and prohibited, and this is the first example, the *Presley* case, where there has been a weakening of that. As a matter of fact, it has been enormously successful. I don't think there is anybody that doesn't say that section 5 is not a very healthy thing for our country.

But it seems to me that the weakening in *Presley*—and I want to ask you two witnesses about that—would open the door for such a weakening of preclearance that, you know, you could have somebody elected, and we will say—in Texas or anywhere else—and almost any Hispanic-American who would be elected to an office, and then very quietly the duties could be taken away from this person by the city council or the county board of supervisors or something, and why isn't that a violation of the civil rights laws or the Voting Rights Act? When you open the door here, you are gone. Also, I don't think it is going to be too difficult to write the statute, the correction of *Presley*.

Mr. Parker.

Mr. PARKER. I think the Chair is right on that, and I agree with the Chair's statement. Certainly these can be very serious problems. The *Presley* decision does not affect the core of voting rights changes that we are looking at today in terms of redistricting and reapportionment switches to at-large elections. That type of thing is not affected by the *Presley* decision, but it does open the door to a new kind of discrimination that some writers on the subject have described as third generation.

In other words, the first generation discrimination was denying people the right to vote; the second generation was, once they had the right to vote, you gerrymander the districts so the votes don't count; and now we have kind of been able to overcome that second generation of discrimination and now we are encountering a third generation of discrimination where they have the right to vote, the districts are fair districts, their vote can count, they can elect minority office holders, but they elect them to hollow offices, and the powers of these minority office holders are shifted around and diluted.

So I think the Chair is correct that this represents potentially an enormous problem and needs to be dealt with.

Ms. THERNSTROM. Can I respond to that?

Mr. EDWARDS. Yes, please.

Ms. THERNSTROM. In the first place, I don't see the *Presley* decision as a weakening of section 5 at all. It is simply a refusal to extend the meaning of section 5, and I was glad to hear Frank Parker say just now that, look, preclearance is here to stay and there is no real threat to the enforcement of section 5 as we have known it, and I don't believe that we are opening the door at all to new kinds of discrimination because, after all, that door has been open for the entire time that section 5 has been on the books, and the meaning of section 5 has been clear and almost no one, as Mr. Dunne said, has walked through it, and I do find, with all due respect, that kind of ringing the bell of alarm a little bit equivalent to, in 1982, when people said, "Look, if we don't pass this really radical amendment to the Voting Rights Act and amending section 2, we are going to back to racist registrars in Mississippi keeping people from their basic right to vote."

I don't think we need to get alarmed here at all. There is not going to be any backsliding. The question is to what extent we want to give the Justice Department what I regard as radical new powers.

Mr. PARKER. Let me just correct Professor Thernstrom on her statement. Mr. Chair, on footnote 9 of my testimony I list four court cases where in the past jurisdictions have tried to transfer powers of elected officials to prevent newly elected minority officials from exercising the full powers of those offices, and in all five of those cases the courts have held that this was covered by section 5 of the Voting Rights Act, couldn't be implemented without Justice Department preclearance. So Professor Thernstrom is wrong. The

Presley decision does have an adverse impact on these four court decisions and is a setback.

Ms. THERNSTROM. Well, obviously, the majority on the Supreme Court did not read those decisions in the same way that Mr. Parker does.

Mr. EDWARDS. Well, it has been very helpful, and we have other witnesses and we have to move along, but your full statements are part of the record and will be perused very carefully by us. We thank both of you for testifying today.

Ms. THERNSTROM. Thank you.

Mr. PARKER. Thank you.

Mr. EDWARDS. Theodore Shaw is currently an assistant professor of law at the University of Michigan Law School. Prior to joining the law school faculty, Professor Shaw served as western regional counsel as well as assistant counsel and director of the education docket for the NAACP Legal Defense and Educational Fund. Professor Shaw was also a trial attorney for the Civil Rights Division of the U.S. Department of Justice.

Professor Shaw, you are welcome, and you may proceed. Without objection, all three statements will be made a permanent part of the record.

STATEMENT OF THEODORE SHAW, PROFESSOR, UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. SHAW. Thank you, Mr. Chairman. Thank you for the opportunity to testify today on this very important bill.

I want to say first that I'm not addressing the bilingual provisions, the extensions that are before the committee. I support them, but I leave that discussion to others with much more expertise on that matter than I have. I want to address the *Casey* case and the *Presley* case, and I will not read my entire testimony that is in the record.

I do want to start out by making a point, though, that came up in the last panel. I can't resist addressing this point, because I think it is important. It seems to me that when we talk about drawing districts that maximize opportunities for minorities to elect representatives and we describe that as gerrymandering, we are missing a very important point.

That point is that, although we are making great progress, and Congressman Hyde pointed to some very, I think, important examples—we are making great progress in terms of breaking the link between voting and racial political—we are not there yet, and that the majority of whites in this country still vote in sufficient patterns as to defeat minority candidates when they run for office or at least make it difficult for them to get elected, and, very similarly, when we talk about housing segregation, housing segregation is still a reality, and it is not a reality for the most part because of choices made by African-American individuals.

Although, of course, they are free to make decisions about the kind of neighborhoods they would like to live in in an ideal world, the world hasn't been ideal, and we still know that when communities get to be 8 percent or so black, whites begin to move out. What I am addressing is this tendency to look at the remedies that African-American and other civil rights advocates have propounded to address the reality of continuing racial segregation and discrimination in this country and then say that that is the problem—those remedies—as if there is not a historical background for another reality that required those remedies, and I think it is very important to put this in that context.

With respect to the *Casey* decision, I litigated civil rights cases, including voting rights cases, for approximately a dozen years, and, in no small part because of the burdens of proof that the Supreme Court has required across the board in civil rights cases and particularly in voting rights cases, it is absolutely necessary to have expert witnesses testify in those cases or at least provide preparatory services for plaintiffs. As Mr. Parker said, if they are not used, plaintiffs simply cannot win these cases.

It seems to me that the 1976 civil rights attorneys' fees award statute has a very strong legislative history which Justice Scalia and the majority in *Casey* have explicitly ignored. That legislative history makes clear that Congress was concerned about individuals being able to vindicate constitutional rights and did not want to see them fail to vindicate those rights simply because the resources were unavailable.

That is why the Attorneys Fees Awards Act was passed, to make sure that people would be able to get lawyers to represent them in civil rights cases. Although expert witness fees were routinely awarded prior to the *Alyeska* case which required, in fact, the passage of the Attorneys Fees Awards Act, the act didn't speak about the award of expert witness fees because that decision didn't speak about them.

The assumption, I think, on the part of Congress was that there would be a return to the pre-*Alyeska* regime in which attorneys' fees and expert witness fees were awarded, and that is what Congress apparently did. The Supreme Court, however, in two decisions then squeezed those expert witness fees out of any statutory base, first squeezing them out of costs in the decision, *Crawford* v. *Pipefitting Co.*, and then again squeezing them out of attorneys' fees in the *Casey* decision. It is essential, as I say, that Congress address this problem.

We have already seen the effects. Mr. Parker talked about a couple of cases, but those cases are not unusual; they don't stand alone. For example, in voting rights litigation in Los Angeles brought on behalf of Hispanics in which I represented African-American interveners who were protecting their interests, hundreds of thousands of dollars were spent on both sides of the litigation in witness fees. I heard at one point that one of the counties' expert witnesses was paid more than one of the parties' entire array of expert witnesses, and it seems to me if we are going to have an opportunity to litigate those cases with some kind of evenhandedness, some opportunity to win, we can't allow a situation where plaintiffs can't recover those fees.

Because of the decision in *Casey*, Richard Lawson of MALDEF tells me that they lost immediately over $100,000 in expert witness fees that they put out. The NAACP Legal Defense Fund in a voting rights case in Arkansas, *Jeffers* v. *Clinton*, lost approximately $87,000 in expert witness fees because of the *Casey* decision. Those organizations cannot sustain those hits over periods of time. It will have an effect on their ability to bring litigation. On the other hand, I think it is important to also recognize that private attorneys or solo practitioners won't even touch these cases or go near them because they think they will have to eat those expert witness fees.

On this point, I think it is important to realize what Justice Scalia is saying. He appears to be saying to Congress that if you don't pass legislation with perfect statutory aestheticism, if there are differences between the language of statutes that appear to address similar problems, we are going to read into that an intent that you didn't intend to accomplish the award or effectuation of the award of expert witness fees, for example.

That flies in the face of the legislative history which Justice Scalia says he won't look at, and I think that what he is looking at is a political process that is inherently a process involving compromise, it is a sausage-making process, and he is saying, "I want filet, and I insist upon it." It is simply not that kind of process.

Finally, with respect to the *Presley* case, as we know, Frank Parker wrote a book called "Black Votes Count." It seems to me that the message the Supreme Court is sending is that black votes count in the sense of, you can get representation, but black votes don't count in terms of getting effective representation. That is, you can elect somebody to office but you may not get effective representation because we can change the rules.

Whether or not section 5 addressed it before, I think that this is a problem that needs to be addressed now. I think section 5 did address it before, but the fact is, if public officials can discriminate in this way and gut the effectiveness and the meaning of the Voting Rights Act in this way, then Congress needs to address it. It seems to me that the discussion that we have been having in some sense is off key. The problem is that it is a roadmap, a blueprint, for a blatant form of discrimination that needs to be addressed, and Congress has been in the business for a long time of addressing complex questions and coming up with sufficient statutory language. I have no doubt that it can do it here.

Presley creates a huge exception to the prophylactic measure in section 5, the way it had been interpreted before, precisely at the point where it is most needed, when people of color are actually in a position to wield power, and inevitably as the ballot access and fair line drawing guarantees of the act are enforced, the critical issues remaining are whether representatives are effectively able to exercise their electoral mandates and whether minority voters, through their representatives, will have an opportunity to participate in governmental decisionmaking. *Presley* forecloses any hope that we will, and this flies in the face of the act's original purpose.

I commend the committee for opening up this question and attempting to address it and urge, whether it is in this legislation or in subsequent legislation, the Court to address these two cases which really cut back on voting rights enforcement.

Mr. EDWARDS. Thank you, Professor Shaw.

[The prepared statement of Mr. Shaw follows:]

Testimony of Professor Theodore M. Shaw, University of Michigan Law School, before the House Judiciary Subcommittee on Constitutional Rights and Civil Liberties

April 8, 1992

Mr. Chairman and Committee Members:

Thank you for the invitation to testify today in support of measures aimed at strengthening the Voting Rights Act, one of the most important pieces of civil rights legislation in the statute books. As you are well aware, the Voting Rights Act has been extended and amended on a number of occasions, so that it could continue to guarantee a meaningful vote and political access to groups that have been historically excluded from meaningful participation in the political process. It has been said that "the price of freedom is eternal vigilance". This is certainly true of the freedom to vote; thus from time to time this Committee must lead the Congress to address new as well as continuing threats to the exercise of the right to vote.

My testimony today is narrowly focussed. I do not intend to address the bilingual provisions that have been proposed. While I support those provisions I leave their explication to others with more expertise on their subject matter. I address the need to correct the Supreme Court's decisions in West Virginia University Hospitals, Inc. v.

Casey, [1] and in Presley v. Etowah County Commission,[2]. Without corrective legislation each of these Supreme Court decisions poses a threat to the ability of civil rights plaintiffs to successfully vindicate their right to vote free of discriminatory practices.

In Casey, the Supreme Court held that prevailing civil rights litigants could not recover expert witness fees as part of the "attorney's fees" awardable under Title 42, section 1988 of the United States Code. Professor T. Alexander Aleinikoff, of Michigan Law School, and I have argued that the court's approach in Casey did not do justice to the Attorney's Fees Award Act or Congress and - most importantly - to the persons the statute attempts to protect.[3] The Civil Rights Attorney's Fees Awards Statute was enacted in 1976 in the wake of the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, [4] which held that in the absence of specific statutory authorization federal courts lacked the authority to shift attorney's fees to the losing party. Congress reacted to Alyeska in the civil rights area by passing legislation to ensure that individuals with legitimate civil rights claims would have access to avenues through which they could vindicate their rights. The legislative history of the Attorney's Fees Statute supports the contention that Congress was attempting to ensure that civil rights protections would be available to all regardless of financial resources. The Senate Report stated:

---

[1] 111 S. Ct. 1138 (1991).

[2] 60 U.S.L.W. 4135 (1992).

[3] See T. Alexander Aleinikoff and Theodore M. Shaw, "The Cost of Incoherence; A Comment on Plain Meaning, West Virginia University Hospitals, Inc. v. Casey, and the Due Process of Statutory Interpretation", in the upcoming edition of Vanderbilt Law Review. I wish to acknowledge Professor Aleinikoff's contribution to this testimony and that I borrow heavily from our article.

[4] 421 U.S. 240 (1975).

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.[5]

Prior to 1976 the civil rights landscape consisted of a patchwork of statutory provisions authorizing fee-shifting, augmented by the exercise of equitable powers of federal district courts in some areas where statutory authorization did not exist. Consequently, prevailing civil rights plaintiffs could often recover the costs, fees and expenses of litigation. After *Alyeska*, prevailing civil rights plaintiffs in employment discrimination cases, for example, could recover attorney's fees, while plaintiffs in school desegregation or housing discrimination cases could not. The Senate Report accompanying the Fees Act stated that "[t]he purpose of this Amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in [*Alyeska*] and to achieve consistency in our civil rights laws."[6]

---

[5] Civil Rights Attorney's Fees Awards Act S. Rep. No. 94-1011, 94th Cong., 2d. Sess. 2 (1976).

Presumably because *Alyeska* did not address the issue of expert witness fees recovery, the Fees Act was correspondingly silent on that issue. The broad pre-*Alyeska* practice was to allow prevailing civil rights plaintiffs to recover expert witness fees, although courts were not always clear as to whether they were recoverable as part of attorney's fees or as part of costs. Nor did the pre-*Alyeska* civil rights statutes adequately address the issue of expert witness fees recovery. Thus, if Congress had addressed the issue in the Fees Act, it would have created at least the appearance of further anomalies among civil rights statutes, because the Fees Act addressed only those civil rights statutes that did not already include attorney's fees provisions.[7] An expert witness fees provision might have been interpreted by some as a signal of departure from the pre-Alyeska practice of awarding expert fee recovery as part of attorney's fees and costs. The intent of Congress was to restore the pre-Alyeska regime in the civil rights area.

---

[6] Civil Rights Attorney's Fees Awards Act S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976).

In 1987 the Supreme Court ruled that expert witness fees are not recoverable beyond the statutorily authorized witness fee as part of costs because, absent explicit statutory authority federal district courts lack the power to shift litigation costs beyond items delineated in 28 U.S.C. section 1920 and section 1821(b).[8] Some courts continued to award expert witness fees as part of attorney's fees, until Casey prohibited that practice.

---

[7] The Fees Act applies to cases brought pursuant to 42 U.S.C. sections 1981, 1982, 1983, 1985 and 1986, to 20 U.S.C. section 1681 et seq., (Title IX), or to 42 U.S.C. section 2000(d) et seq. (Title VI of the Civil Rights Act of 1964).

[8] Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). 28 U.S.C. section 1920 authorizes a court to shift as costs fees of the clerk and marshall, court reporter and stenographic fees, printing expenses and witness fees, copying fees, docket fees, and compensation of court appointed experts and interpreters. 28 U.S.C. section 1821(b) presently authorizes payment of witness fees at forty dollars ($40.00) per day, a negligible amount for experts.

Casey's effects have severely undercut the purposes of the Civil Rights Attorney's Fees Awards Act of 1976. Civil rights cases, and particularly voting rights cases, have become battles of experts, in no small part due to the difficult burdens of proof that the Supreme Court has placed upon civil rights claimants.[9] Expert witness expenses are a a major part of litigation expenses, often amounting to tens of thousands of dollars and sometimes even to hundreds of thousands of dollars. In *Jeffers v. Clinton*,[10] for example,

---

[9] For literature on the kinds of expert analyses necessary in voting rights cases, see Richard L. Engstrom & Michael D. McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urban Law. 369 (1985); Bernard Grofman, Michael Migalski & Nicholas Noviello, *The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 L & Pol. 199 (1985) (cited in *Thornburg v. Gingles*, 478 U.S. 30, 53, n.20).

For a discussion of the role of expert historians, see McCrary & Hebert, *Keeping the Courts Honest: The Role of Historians As Expert Witnesses in Southern Voting Rights Cases*, 16 S. U. L. Rev. 101 (1989). McCrary and Hebert observed that in the 1980's historians serving as expert witnesses have had a significant impact on the outcome of several federal voting rights cases. Id., citing *Bolden V. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); *Brown v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), aff'd 706 F.2d 1103 (11th Cir. 1983), aff'd 464 U.S. 1005 (1983); *County Council of Sumter County v. U.S.*, 555 F. Supp. 694 (D.D.C. 1983); *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), aff'd in part, vacated in part, remanded 831 F.2d 247 (11th Cir. 1987).

[10] 730 F. Supp. 196 (E.D. Ark. 1989), aff'd 111 S. Ct. 662 (1991). The district court's opinion is dated December 4,

African-American plaintiffs successfully brought a statewide suit against the Arkansas Board of Apportionment under Section 2 of the Voting Rights Act of 1965.[11] The district court's opinion identified the standard of proof the Supreme Court established in Section 2 cases[12] and explicitly relied on plaintiffs' experts' testimony in determining that the requisite standard of proof was met.[13] In a subsequent decision on the plaintiffs' application for fees and expenses, the district court acknowledged that "[t]his mammoth case could not have been undertaken with the Legal

---

1989. A First Dissenting Opinion by Judge Eisele was dated three days later, and a Second Concurring and Dissenting Opinion by Judge Eisele was dated January 26, 1990.

[11] Id. at 217.

[12] Id. at 205 citing Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). Plaintiffs are required 1) to establish that the minority group challenging the election scheme is sufficiently large and geographically compact enough to constitute a majority in a single member district; 2) to show that the minority group is politically cohesive; and 3) to show that the majority votes sufficiently as a bloc to usually defeat the minority group's preferred candidate. Id.

[13] Id. (finding "that black communities in the areas of the State challenged by plaintiffs are sufficiently large and geographically compact to constitute a majority in single-member districts" and relying heavily on the plaintiffs' experts' testimony); id. at 206-07 (reproducing the maps drawn by an expert for alternative House and Senate districts); id. at 208-09 (crediting and relying upon the single regression, double regression, and homogeneous-precinct analyses of another expert for the plaintiff).

Defense Fund's lawyers and resources,"[14] thus reflecting the difficulty solo or small practitioners have in financing such litigation. Yet, relying on Casey, the court denied plaintiffs' request for $86,820 in expert witness fees and expenses[15] and reimbursed plaintiffs at the $40.00 per day rate prescribed by 28 U.S.C. Section 1821, in the amount of $2,236[16]. Consequently, to vindicate their clients' civil and constitutional rights successfully, the plaintiffs' attorneys had to expend $84,584 of their own money without recovery. It is unlikely that antitrust, securities, or commercial litigation lawyers would provide representation under similar circumstances.

Although Casey does not affect a civil rights plaintiff's ability to win meaningful substantive relief in a case in which expert witness fees are denied, the decision's impact is felt by the attorneys whose resources have been depleted by the amount of expert witness fees they have had to absorb. That amount is, in effect, subtracted from whatever attorney's fees they can recover pursuant to the Fees Act or other statutory authorization, thus making a civil rights case a more risky and a less attractive venture. Similarly, civil rights organizations must absorb the amount expended on expert witnesses through their general budget. Of course whatever amount is spent on expert witnesses is not available to litigate the next case.[17]

---

[14] 776 F. Supp. 465, 469 (E.D. Ark. 1991). The court further noted that two other public interest organizations, Eastern Arkansas Legal Services and the Lawyers' Committee for Civil Rights, "refused to handle the case because of its difficulty and broad scope". Id. at 473.

[15] Id. at 474. Appendix A reveals that $82,882 of the amount denied had been advanced by the NAACP Legal Defense Fund, while $3,938 was submitted directly to the court by one of the plaintiffs' experts. Id. Appendix A, at 475, 476.

[16] Id. at 474.

There is already troubling evidence that Casey has had precisely this effect. In Garza v. Los Angeles County Bd. of Supervisors, the Mexican American Legal Defense Fund (MALDEF) won a major victory under the Voting Rights Act, paving the way for the election of the first Latino supervisor to the Board. The complex case demanded substantial preparatory and testimonial assistance from experts. MALDEF's application for fees detailed $152,942.45 in out-of-pocket expenses for experts. But, Casey, decided just a few days after the fees application was filed, made recovery of these expenses impossible. Because MALDEF was forced to absorb the costs for experts in Garza, it had fewer funds available for additional litigation and found it necessary to declare a moratorium on the filing of new litigation for the remaining quarter of its 1991-92 fiscal year. According to E. Richard Larson, Deputy Director of MALDEF, "[h]ad we been able to recover our $152,942.45 in expert fees in Garza, we probably would not have imposed the moratorium on new litigation."[18]

---

[17] Of its annual $1.2 million litigation budget, the NAACP Legal Defense Fund spends an average of $200,000 per year on expert witness services. Its deputy director counsel has stated that "everything we do is expert witness driven" and that "in recent years LDF has lost many cooperating attorneys because they were unable to carry the expenses in civil rights cases, of which expert witness fees are a significant proportion." Telephone interview with Clyde Murphy, Deputy Director Counsel For the NAACP LDF (January 10, 1992).

Justice Scalia, speaking for the Supreme Court in Casey, rests his opinion on the "plain meaning" doctrine of statutory interpretation. In his view, congressional intent is difficult, if not impossible to discern, legislative histories are grab bags which have been loaded with conflicting statements and provide something for everybody, and Congress should be forced to say exactly what it means with perfect precision. While linguistic precision and consistency are desirable and admirable, I believe Justice Scalia's theory of statutory interpretation reflects a fundamental disregard for the nature of the legislative process. Legislation is the result of compromise, political exigencies and judgment calls about what can be passed in a legislative package at a given moment and what cannot. The realities of the political process produce statutory schemes that are aesthetically imperfect; Congress may intend a uniform result but over time may also seek to achieve that result in varying ways dictated by the political exigencies of the moment. Justice Scalia and the Casey Court insist on filet in spite of the fact the political process produces sausage.

---

[18] Letter from E. Richard Larson to Theodore M. Shaw (January 14, 1992)(on file with Vanderbilt Law Review). Larson further noted: "We currently have many cases in the pipeline-mostly redistricting cases-in which we have had to expend substantial sums in expert fees. Our inability to recover these expert fees also will have a significantly adverse effect on our ability to pursue new litigation."

While varying approaches to statutory interpretation are the stuff law review articles are made of, the real life effects of Casey are devastating. At least in some instances, rights will remain unvindicated. People will be excluded and disempowered. The purposes of the Attorney's Fees Act will be subverted and the promise of equality before the law will ring hollow.

I urge this Committee to lead Congress to overturn Casey in this bill, and here and elsewhere to restore the prior practice of allowing prevailing parties in civil rights cases to recover expert witness fees.

1. Presley is a Fundamental Assault on the Purpose of the Voting Rights Act

In *Presley*, the Court did not dispute the nature of the electoral changes made in Etowah and Russell Counties. African American road commissioners were stripped of their authority and left unable to perform the functions that African American voters elected them to perform. The Court, however, did not find these changes illegal. It said that the Voting Rights Act does not reach the exercise of governmental authority once an election has occurred. According to the Court, §5 only protects changes related to the physical act of voting. This ruling undercuts the very purpose of the Act in two distinct ways.

Section 5's function is to screen all potentially discriminatory electoral enactments, particularly mechanisms whose "source and forms (Congress) could not anticipate, but whose impact on the electoral process would be significant." *Dougherty County Bd. of Educ. v. White* 439 U.S. 32, 47 (1978). The legislative history of the Act makes clear that it was enacted in response to a real history of extraordinary voting discrimination, not conjecture or speculation. The Act was passed after more than 100 years of unsuccessful efforts to enforce the fifteenth amendment.

Section 5 was enacted to address the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 47 (1978). It was made narrow in scope, only applying to jurisdictions that were shown to have a particularly egregious history of voting discrimination and diminished minority voter participation. Congress realized in 1965 that without close supervision, certain jurisdictions would continue in their "unremitting and ingenious defiance of the Constitution," *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Ongoing litigation under the Voting Rights Act by the NAACP Legal Defense Fund and other civil rights groups makes clear that there is a continuing need for §5 enforcement. It is the principle mechanism for preventing whites from regularly foreclosing every alternative avenue of minority political power.

Presley creates a huge exception to this prophylactic measure precisely at the point where it is most needed--when people of color area actually in a position to wield power. Inevitably as the ballot access and fair line-drawing guarantees of the Act are enforced, the critical issue remaining is whether our representatives are able effectively to exercise their electoral mandates and whether minority voters, through their representatives, will have an opportunity to participate in government decision-making. *Presley* forecloses any hope that we will, and this flies in the face of the Act's original purposes.

This brings me to my second point. The 1965 legislative history of the Act makes very clear that the Act was intended to protect the meaningful exercise of the vote, not just the physical exercise of casting a ballot. Lawmaker after lawmaker testified in

1965, and again in 1970, 1975 and 1982 as the Act was extended, about the important policy issues that people of color could address for themselves once we obtained the right to vote. *Presley's* conclusion, which does not cite any legislative history, makes a mockery of the days and days of Congressional hearings and fact-finding, which were reaffirmed with each extension of the Act, about what was needed to rectify the ongoing history of voting rights abuses in this country.

2. Electoral Changes that Affect the Weight of a Citizen's Vote are Subject to the Voting Rights Act

The question raised by *Presley* is whether transfers of authority are "changes with respect to voting" within the meaning of §5. The Court in *Presley* avoided the obvious by focusing on its own definition of "voting procedures" rather than the plain language of the statute. That language defines *voting* as "all action necessary to make a vote effective." The Department of Justice has interpreted this language to mean that shifts "in the powers and duties of the governing entity bring . . .[a] transition within the purview of Section 5 even though the structure of the governing body remains the same." Clearly transfers of authority can affect voters' ability to case an effective ballot. A vote cast for mayor is meaningless if the mayor is relegated to the role of dogcatcher. Voters who chose an "environmental" candidate consider their vote effective when she votes on issues relating to toxic waste. Voters who elect a road commissioner are stripped of their power if he can only tend the courthouse grounds. These examples draw upon the most elementary principles of representative democracy: we vote for candidates who represent our views with the expectation that winning enables them to implement those views once in office.

Reallocations of authority are not the only kinds of changes in the structure and function of governing bodies that "affect the power of a citizen's vote." *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). Changes in the rules by which governing bodies make decisions can have the same affect. In its *Presley* brief the Department of Justice disagrees, however, the following examples make the affect on voting power clear: If all of the white commissioners are allowed two votes on school issues while commissioners elected by the minority community are allowed only one, minority voters have had their political influence diluted. If a gag rule is imposed on all minority-chosen commissioners during meetings, minority voters have virtually no voice in county government. If the county school board changes its procedures to require two, rather than one, vote to place an item on the agenda and the sole minority board member cannot get a second for her motion, the member's minority supporters effectively are silenced. This is precisely what happened in *Rojas v. Victoria Independent School District*, Civ. Act. No. V-87-16 (S.D. Texas, Mar. 29, 1988), *Affd*, 490 U.S. 1001 (1989), a result summarily affirmed by the Supreme Court in 1989.

3. Presley is a "Neon-Lit Race Label"

In a recent article, journalist and scholar Roger Wilkins talks about "neon-lit race labels" that galvanized African Americans into opposition to segregation in all of its forms in this country. *Presley* is just such a symbol. It is the first black official elected since Reconstruction being told to tend the courthouse grounds rather than build bridges and roads. It's no different than the sheriff or the governor standing in the school house door daring black school children to pass or the black woman who is arrested for refusing to give up her seat on the bus. It tells people of color that while America upholds democracy all over the world, for people of color here, democracy is meant as nothing more than am formal exercise. *Presley* is an insult to African American aspirations and to the bedrock democratic values held by all Americans.

4. *Presley* is a Fundamental Assault on Congress's Authority

In recent years, the Supreme Court increasingly has ignored the legislative history that defines the interpretation of statutes. These roadmaps of statutory construction have been discarded in favor of reckless forays into uncharted areas of social policy that more properly are within Congress's domain. Rather than be guided by the clear words of Congress, the Court is satisfied to divine what Congress would have said had it shared the Court's own world view. *Presley* is but the latest example of the Court's usurpation of Congress's role to determine national policy.

Mr. **Edwards**. We will have to recess because there is another vote, and we will be back as soon as we can.

[Recess.]

Mr. **Edwards**. The subcommittee will come to order.

Joaquin Avila is currently a voting rights attorney in private practice. Mr. Avila served as the general counsel and president of the Mexican American Legal Defense Fund.

Welcome. We are delighted to have you here, and you may proceed.

STATEMENT OF JOAQUIN G. AVILA, VOTING RIGHTS ATTORNEY, MILPITAS, CA

Mr. **Avila**. Thank you very much.

I am a voting rights attorney who has an office in Milpitas, CA, and I have been doing voting rights cases since 1974, and in 1985 I started to do them in a private practice capacity.

The reason I got involved in voting rights cases, and particularly in private practice, is because there is a statewide problem in California. Even though Latinos comprise close to 25 percent of all of the State's population, less than 6 percent of all the city council members and school board members and special election districts in California have Spanish surnames. There is a very severe disparity between the representation in the population and the representation on political bodies.

As a result of that and as a result of landmark cases such as the L.A. County redistricting case that resulted in the elimination of a gerrymandered supervisorial district and subsequent election of Gloria Molina, the first Latino elected to that board, in well over 100 years, and also other cases, such as the *City of Watsonville* case, which was an at-large election challenge, there has been a greater interest in the Latino community in California to address the issue of voting rights.

In all my travels throughout the State, the issue of voting rights is on the front burner, and it has come at a cost to our community. Most recently in some at-large election cases that I have against various local jurisdictions in Tulare County, the client community in one particular case wanted to address the issue of whether the school board should settle the at-large election challenge in order to avoid a needless expenditure of litigation costs and escalating expert witness costs and so on, on both sides of the case, and they tried to present their petition before the school board.

Prior to the school board, they sought to be placed on the agenda; they never were placed on the agenda. When they went to the school board to be placed on the agenda, the school board refused to place them on the agenda. As a result of that, they broke out into a confrontation, and various people of the Latino community were arrested, and some were seriously injured as a result of those arrests.

In addition, one of my clients in one of these cases has received a recorded——

Mr. **Edwards**. What city is this in?

Mr. **Avila**. Dinuba—Dinuba in Tulare County.

In another case that I have, one of my clients received a recorded bomb threat on her answering machine, and, as a result of that recorded bomb threat, she and her family changed their phone number and they are now very apprehensive about how they go about their daily lives.

So this is a very big issue in California, the issue of minority political representation on school boards and city councils, and the only effective tool that we have out there is the Voting Rights Act. It is the most effective piece of civil rights legislation that has been enacted to address the issue of voting rights. It was only because of the Voting Rights Act that we were able to dismantle the discriminatory at-large election system in the city of Watsonville. It was only because of the Voting Rights Act that we were able to eliminate the gerrymandered supervisory district in Los Angeles County.

So the Voting Rights Act is the most effective tool that we have to eliminate these discriminatory election systems, and there is a significant problem in California. Close to 90 percent of all the school boards and city councils in the State and also the special election districts in that State have at-large elections, and when you have racially polarized voting, when the Anglo community doesn't support candidates preferred by the Latino community, if you are a member of that minority community you are going to consistently lose, and that was documented factually in the *City of Watsonville* case. In that community, the Latino community had run nine times, and nine times they got defeated over a period of 10 years or so, and the reason they got defeated was because of racially polarized voting. So there is that problem that is statewide.

We do have very well documented instances of racially polarized voting occurring across the State in a variety of areas. Just recently in the L.A. County case, the Federal district court made a specific finding that there was racially polarized voting with respect to Hispanic and non-Hispanic voters.

So given that we have this problem, how do we go about addressing it? We have tried to go through the State legislature, and the State legislature has on several occasions refused to even pass a very limited form of district elections bills for cities and school boards. This past session, we were able to get a very limited bill coming out of the State legislature which was then vetoed by the Governor.

So the Voting Rights Act is the only tool that we have now, and in California there are organizations that are out there enforcing the act, but they have limited resources—the Mexican American Legal Defense Fund, the Southwest Voter Registration Fund, the ACLU, and so. They have been involved in some voting rights cases. But we are talking about well over 450 cities, we are talking about close to 1,000 school districts, and we are talking about several thousand special election districts. So these organizations, because of their limited funding and resources, cannot address the issue of challenging discriminatory election structures.

So the only way we are going to be able to address this is through private enforcement, and this private enforcement will not take place unless we have expert and consultant witness fees as part of the cost when you win a case. And I want to remind the committee here that you don't get attorneys' fees if you lose cases, you get them only if a Federal court finds that you are the prevailing party and finds that you are entitled to a reasonable award of attorneys' fees. So we have an impartial arbiter or an impartial institution that regulates the awards of fees to attorneys.

Presently, I am the only attorney in private practice in California that has devoted their private practice exclusively to voting rights cases, and the reason that is the case is because these voting rights cases are very complex and they are very different from your ordinary civil cases. By complex, I mean that in the ninth circuit, which covers California, the Ninth Circuit Court of Appeals—as a result of a recent ninth circuit court opinion, which I cite in my testimony, we as litigators are required to factually investigate whether we have a good case or whether we have a reasonable opportunity to satisfy the requirements of Federal rule 11 to show that the case is not frivolous or without merit.

So we are obligated to conduct investigations into the criteria that were mentioned by the Thornburg Supreme Court decision in terms of geographical compactness of a community, in terms of racially polarized voting, whether the community is politically cohesive, and whether there exists an Anglo voting bloc that doesn't vote for the preferred candidates of the Latino community, and, in addition to that, there are these other Senate report factors that were specified in the Senate report accompanying the 1982 Voting Rights Act which we also have to look into, such as historical discrimination, the presence of slating groups, and so on.

In all of these preliminary inquiries, we have to rely on social science experts to conduct these kinds of studies, and our clients cannot afford the tens of thousands of dollars that are often required to prosecute these cases. So, for that reason, when a member of the client community goes to a private attorney for challenging a discriminatory at-large election system, they are rejected, and we have been documenting this in the *Watsonville* case, we have documented this in recent cases in Tulare County, and so on.

So the fact is that unless these cases are made accessible in terms of other cases in the private market that private attorneys can respond to, you are not going to have effective enforcement of the Voting Rights Act, and the Department of Justice cannot litigate all of these cases. If we want to see effective enforcement of the act, it is going to have to be through private bar involvement. If you don't amend the statute that would permit the collection of expert consultant fees, you are not going to see many more of these cases. There is going to be a limit in terms of people actually being able to advance the cost of $20/30,000 or $50,000 with no expectation of getting paid or reimbursed even if you win. The same thing is true of multipliers which I state in my testimony.

In the private sector, when you take a case for which you are not going to receive any compensation unless you win a contingency case, that case will require an added enhancement to the award of attorneys' fees in order to attract members of the private bar to file these cases, and if you don't have that codified in the Voting Rights Act statute, again you are going to see that the private bar is simply not going to get involved in those kinds of cases.

Presently in the ninth circuit, there are some decisions that permit under certain circumstances the award of multipliers in attorneys' fees. These are not windfalls to attorneys. These cases are very risky, very complex, and they take many years to litigate, and you don't always win.

As a result of my 5 years of practice, I have had to absorb in actual cases that have been filed close to 1,100 to 1,200 hours of attorney hours. In cases where we decided not to file as a result of expert reports and so on in our evaluation, we have had—when I say we, I have had to absorb several thousand hours of attorney hours and paralegal hours in evaluating these cases. So unless we provide these kinds of changes in the statute, we are not going to see the private bar involvement, and that is why it is so critical if you want to address that issue.

The second point that I wanted to just briefly highlight is the *Presley* decision. I totally agree with Representative Conyers; this is a blueprint for jurisdictions, and section 5-covered jurisdictions to evade their responsibilities of the Voting Rights Act. Sure, we open up the doors to them, let them even sit at the table, but we are going to prevent them from getting on the agenda by changing the rules for making agendas. We are going to prevent them from wielding the kind of power that we have by changing the governmental functions. That is the reality, and we here in Congress and I coming before you, we need to deal with that reality, because it is one thing to have a Voting Rights Act in name only and no enforcement of it, and if we don't have a statute that addresses the issue that was presented in the *Presley* case, again we are going to have a Voting Rights Act in name only.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Avila. That is very helpful.

[The prepared statement of Mr. Avila follows:]

Testimony and Prepared Statement:

Voting Rights Act
Hearings
April 8, 1992

Joaquin G. Avila
Voting Rights Attorney

Introduction

I am Joaquin G. Avila. I am a voting rights attorney with an office located in Milpitas, California. My practice consists of voting rights cases. These cases involve actions to enforce Sections 2 and 5 of the Voting Rights Act, and actions to enforce the one person one vote principle. I have been involved in voting rights cases since 1974, when I started to work as a staff attorney for the Mexican American Legal Defense and Educational Fund. After 11 years with the organization, serving as President and General Counsel for 3 years, I established a practice devoted to voting rights cases.

My testimony before this subcommittee will highlight the current struggle by the Latino community in California to enforce the most fundamental of all rights, the right to vote.[1] This struggle, for the most part, consists of challenges to discriminatory election structures at the local governmental level. These challenges have focused on gerrymandered election districts and actions against at-large election systems. These efforts by the Latino community to secure greater access to the political process have taken its toll on the Latino community.

---

[1] As noted by United States Supreme Court, the right to vote is fundamental because of the "... significance of the franchise as the guardian of all other rights." *Plyler v. Doe*, 457 U.S. 202, 217, n. 15, 102 S.Ct. 2382, 2395, n. 15 (1982). *See also, Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.").

Recently, a plaintiff in several Voting Rights Act, 42 U.S.C. § 1973, *et seq.*, lawsuits filed against political jurisdictions in Tulare County, California, received a bomb threat on her telephone answering machine. As a result of this bomb threat, her family changed its telephone number and is more careful as they go about their daily lives. The purpose of these lawsuits was to enforce the protective provisions of the Voting Rights Act. The objective of this litigation was to eliminate several at-large election systems which prevented the Latino community from equal participation in the political process. As a result of these discriminatory at-large election systems, the Latino community has no representation on these local governmental entities.[2]

---

[2] There have been five at-large challenges filed against political jurisdictions in Tulare County. These voting rights cases involve the community in Dinuba City and surrounding areas. *Pablo R. Reyes, at al., v. Alta Hospital District*, CV-F-90 620 EDP, *appeal pending*, App. No. 92-15312 (9th Cir.) (successful settlement of at-large election challenge) (appeal involves the award of attorneys' fees); *Noe Elizondo, et al., v. Dinuba Joint Union High School District*, CV-F-91-171 REC (preparation for trial proceeding); *Enrique Reyes, Jr., et al., v. Dinuba Elementary School District*, CV-F-91-170 REC (preparation for trial proceeding); *Enrique Reyes, Jr., et al., v. City of Dinuba*, CV-F-91-168 REC (preparation for trial proceeding); *Hortencia Espino, et al., v. Cutler-Orosi Unified School District*, CV-F-91-169 REC

Voting Rights Act
Hearings
April 8, 1992

The lack of Latino political representation is a statewide problem in California. Based upon figures provided by the California State Assembly Committee on Elections, Reapportionment and Constitutional Amendments, about six percent of elected officials on school boards and cities are Latinos. The figure for special election districts is considerably lower. Since Latinos comprise 25.8% of California's population, such a low level of political representation serves to further politically alienate the Latino community. Such a lack of political integration will not facilitate the creation of a more cohesive society in California. Instead the lack of local Latino political leadership at county, municipal and scholastic levels will contribute to the growing gap between the haves and the have nots, who are increasingly becoming people of color.

The Voting Rights Act is the only tool available to the Latino community to leverage local county governments, city councils, school districts, and special

---

(preparation for trial proceeding). Presently, there is no Latino representation on the Dinuba City Council, the Board of Trustees for the Dinuba Elementary School District, the Board of Trustees for the Dinuba Joint Union High School District, and the Board of Trustees for the Cutler-Orosi Unified School District, even though these jurisdictions contain substantial Latino populations based upon the 1990 census: Dinuba City - 62% Latino population; Dinuba Elementary School District - 57% Latino population; Dinuba Joint Union High School District - 60% Latino population; Cutler-Orosi Unified School District - 75% Latino population.

election districts into instituting election systems which do not have a discriminatory effect on Latino voting strength. Presently, the major obstacles preventing the political integration of the Latino community at the local governmental levels are at-large elections and gerrymandered election districts. Currently, about ninety percent of school districts, city councils, and special election districts conduct their elections on an at-large basis. When racially polarized voting is present and prevents the election of candidates preferred by the Latino community, the at-large election system serves as an effective vehicle for maintaining the over representation of Anglos on elective governing bodies.[3]

---

[3] Racially polarized voting was defined by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 53, n. 21, 106 S.Ct. 2752, 2768, n. 21 (1986):

> "The court used the term 'racial polarization' to describe this correlation. It adopted Dr. Grofman's definition-'racial polarization' exists where there is 'a consistent relationship between [the] race of the voter and the way in which the voter votes,' TR. 160, or to put it differently, where 'black voters and white voters vote differently.' ... We, too, adopt this definition of 'racial bloc' or 'racially polarized' voting."

Racially polarized voting between the Latino and Anglo voting population exists. Such polarization was documented in the recent voting rights cases filed against the Los Angeles County Board of Supervisors for its gerrymandered supervisor districts and against the at-large election system used by the City of Watsonville. *Garza v. County of Los Angeles, Cal.*, 756 F.Supp. 1298, 1334 (C.D.Cal. 1990) ("The results of ecological regression and extreme case analysis reveal that Hispanic

Although the Voting Rights Act has served as an effective tool for eliminating discriminatory election structures, the Latino community in California does not have the available legal resources to systematically challenge discriminatory at-large elections and gerrymandered districts. The Mexican American Legal Defense and Educational Fund, the California Rural Legal Assistance, and the Southwest Voter Registration and Education Project, do not have sufficient resources to challenge these discriminatory election systems. Yet, at the moment litigation in federal court using the protective provisions of the Voting Rights Act is the only realistic alternative for the Latino community to successfully remove these discriminatory election structures. Legislative efforts have been unsuccessful.[4] Consequently, only enforcement by the private bar

---

and non-Hispanic voters in Los Angeles County are polarized along ethnic lines in their choices of candidates."), *affirmed*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 681 (1991); *Gomez v. City of Watsonville*, Civ. Act. No. WAI C-85-20319 (N.D.Cal. 1985), *reversed*, 863 F.2d 1407, 1417 (9th Cir. 1988)("Although the court did not separately find that Anglo bloc voting occurs, it is clear that the non-Hispanic majority in Watsonville usually votes sufficiently as a bloc to defeat the minority votes plus any crossover votes."), *cert. denied*, _ U.S. __, 109 S.Ct. 1534 (1989). Apart from these court cases, my office has conducted numerous voter polarization studies involving political jurisdictions across the state. In each of these studies, there is documented evidence that voter polarization occurs.

[4] The most recent effort to provide district based election systems for a small number of California school districts was vetoed by the Governor. Assembly Bill 1002, California Legislature - 1991-92 Regular Session.

can offer any realistic hope of achieving the goals of the Voting Rights Act of politically integrating disenfranchised minority communities.

Private Bar Involvement is Key to the Enforcement of the Voting Rights Act.

To achieve the purpose of the Voting Rights Act to politically integrate the Latino community, the private bar must become more involved. Presently, I am the only attorney in California in private practice who has a practice devoted to enforcement of the Voting Rights Act. As a result of extensive publicity, I expected other private attorneys to file additional voting rights cases after the *Gomez v. City of Watsonville, supra*, case was decided. The *Gomez* decision was reported in every major newspaper throughout the state, *see, e.g.*, "Watsonville Loss on Election Issue Could be Victory for State Latinos," Los Angeles Times, Monday, May 1, 1989, Part I, at p. 3, "How fed-up Hispanics in small town won vote power," The Sacramento Bee, Sunday, April 2, 1989, "Hispanics Plan Suits on Voting," San Francisco Chronicle, Friday, March 31, 1989, "Voting activists target cities with big Hispanic Population," San Jose Mercury News, Wednesday morning, March 22, 1989, Section B, at p. 1, as well as nationwide, *see, e.g.*, "For Latinos, Immediate Object is City Council Membership," New York Times, Sunday, September 4, 1988. Also, an article appeared in the California State Report on the *Gomez* case - "Watsonville's new crop," Vol. V., No. 9, September 1989, at page 27. Despite this extensive publicity, there have been very few challenges to election systems based upon the Voting Rights Act.

To the best of my knowledge, there were only two such cases filed in 1990. *Reyes, et al., v. Alta Hospital District, supra* (Joaquin G. Avila - lead counsel) (at-large election challenge; case successfully settled); *Soria v. City of Oxnard*, Civ. Act. No. 90-5239 R (private attorney case challenging at-large election system; case voluntarily dismissed by plaintiffs due to lack of resources). In 1991, I filed seven additional cases based upon the Voting Rights Act. *Reyes, et al., v. Dinuba Elementary School District, supra*; *Elizondo, et al., v. Dinuba Joint Union High School District, supra*; *Reyes, et al., v. City of Dinuba, supra*; *Espino, et al., v. Cutler-Orosi Unified School District, supra*; *Vicky M. Lopez, et al., v. Monterey County, California*, Civ. Act. No. C-91-20559 RMW (Section 5, Voting Rights Act action challenging consolidation of judicial districts); *Alonzo Gonzalez, et al., v. Monterey County, California*, Civ. Act. No. C-91-20736 WAI (PVT) (Section 2 and Section 5, Voting Rights Act action challenging adoption of redistricting plan for county supervisor districts); *Maria A. Martinez, et al., v. City of Bakersfield, California*, Civ. Act. No. CV-F-91-590 OWW (Section 2, Voting Rights Act action challenging redistricting plan for electing members to the city council). I am also assisting the California Rural Legal Assistance in *Jose Aldasoro, et al., v. El Centro School District, et al.*, Case No. 91-1410-B(LSP) (at large election challenge). It is my understanding that another private attorney has filed a Voting Right Act action against San Diego County. As one can readily determine, there are only a small number of cases which have been filed to enforce the Voting Rights Act.

There are a variety of reasons for the absence of private attorneys in voting rights cases in California. First, these cases often take years to complete. Second, these cases are expensive to litigate. Voting rights cases, more so than other types of cases, require extensive use of social science experts. Third, voting rights cases as contingency cases are considered risky litigation.

Members of the private bar will only be attracted to these cases if the contingency risk is compensated through the use of multipliers in attorney fees awards and by the reimbursement of social science expert expenses.

With respect to the use of multipliers in determining an appropriate level of attorneys' fees, Congress should specifically incorporate the use of multipliers in the attorneys' fees provision of the Voting Rights Act, 42 U.S.C. § 1973 l (e). The use of multipliers in voting rights cases is appropriate because the degree of financial risk assumed in taking one of these cases is exacerbated by the large amount usually required in out-of-pocket expenses and costs. Particularly in voting rights cases, the clients are seldom able to pay such expenses, and the attorney must advance the expenses with the only realistic hope of reimbursement lying in a fee award if the case is successful.

As a class of civil actions, voting rights cases are different and difficult. Every case will require the application of detailed and complex statistical and demographic analysis. To satisfy the requirements of Rule 11 of the Federal Rules of Civil Procedure an intensive factual pre-filing investigation is necessary. If the case is not settled prior to trial, the evidentiary issues will focus on the validity of various statistical methods to measure racially polarized voting and on the reliability of the demographic analysis. The evidentiary issues raised by the political subdivision can become complex. In addition, the finding of a violation of the Voting Rights Act is often succeeded by protracted litigation to determine the appropriate remedy. Dispute over the appropriate remedy can result in a second major litigation which may last as long as the initial dispute over the finding of liability. For these reasons, voting rights cases are deemed by the private bar to be a separate class of civil actions. To encourage involvement in these cases by the private bar, a substantial enhancement to a potential award of attorneys' fees is required.

In California, the United States Court of Appeals in several cases has provided enhancements to award of attorneys' fees to compensate for the contingency risk and to attract competent counsel. *See, e.g., Fadhl v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1988). However, in the United States Court of Appeals for the District of Columbia, an enhancement to an award of attorneys' fees was denied in an employment discrimination case. *King v. Palmer*, 950 F.2d 771 (D.C.Cir. 1991). In view of this conflict within the federal appellate circuits, Congress should specifically amend 42 U.S.C. § 1973 l (e) to provide for enhancements or the use of multipliers in attorneys' fees award in voting rights cases. Without such a specific enhancement, members of the private bar will not assume the representation of minorities to enforce the Voting Rights Act.

Members of the private bar will also not undertake voting rights cases, if the expenses incurred in securing social science experts are not reimbursable. In *West Virginia Univ. Hosp., Inc. v. Casey*, __ U.S. __, 111 S.Ct. 1138 (1991), the United States Supreme Court concluded that fees for the services of expert witnesses are not compensable beyond the daily witness fees provided by federal statute. Such an exclusion of compensation for expert witness fees is particularly burdensome in voting rights cases.

Voting Rights Act
Hearings
April 8, 1992

As a result of my extensive experience in voting rights cases and the investigative requirements mandated by Federal Rule of Civil Procedure 11,[5] before I file a voting rights lawsuit I conduct a pre-filing investigation to determine the potential success of the anticipated voting rights action. Such extensive pre-filing investigations are absolutely necessary to assure that the proposed litigation has a reasonable chance of success on the merits and to satisfy the requirements of Rule 11.

A pre-filing investigation is also necessary to determine the extent and availability of the evidence to be presented. The development of an extensive fact record is indispensable to address the evidentiary burdens in voting rights actions. The necessity for such an extensive evidentiary presentation at trial is further underscored by the potential appeal a losing party may undertake to reverse an adverse judgment.

As voting rights cases are complex and time consuming cases, the pre-filing investigation must necessarily cover a variety of areas. At a minimum a pre-filing investigation should first determine whether it is possible to create a district consisting of over 50% Latino eligible voters.[6] Second, election records should be analyzed to determine whether a significant number of Latino voters support certain candidates. Third, election records should be analyzed to determine whether an Anglo voting bloc usually votes to defeat candidates preferred by the Latino community. These latter two factors are incorporated into an analysis to determine if voting is polarized along racial or ethnic lines. These three inquiries are specified by the Supreme Court in the *Thornburg* case. Apart from these three inquiries, investigations into some of the factors outlined by the United States Senate in the Senate Report accompanying passage of the 1982 Amendments to the Voting Rights Act should also be conducted. S.Rep. No. 97-417, 97th Cong.2nd Sess. 28 (1982), U.S. Code Cong. & Admin. News 1982, p. 177.[7]

---

[5] *See, e.g., Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990) (*en banc*) (imposes a duty to investigate the facts and claims before filing a case).

---

[6] In the Ninth Circuit, when challenging an at-large election system because of its effect on the ability of the Latino community to elect a candidate of its choice, litigants are required to demonstrate that a hypothetical district consisting of over a 50% minority eligible voter population can be created. *See, Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989). The issue of whether such a requirement is necessary in claims challenging an at-large election system because of its effect on the ability of the Latino community to influence the outcome of an election has not been decided by the Ninth Circuit.

[7] The seven Senate Report factors are as follows: 1) historical discrimination that impacts upon the right of minority groups to participate in the political process; 2) racially polarized voting; 3) election structures, practices, and procedures which enhance the opportunity for discrimination against minority

Social science experts are indispensable in voting rights cases. Social science experts are utilized in conducting the demographic analysis and the racial voter polarization analysis during the pre-filing stage of any potential litigation. Once the case is filed, social science experts are also involved in developing a historical discrimination profile and a socio-economic profile of the minority communities. These experts also assist in the development of trial preparation strategies and in the actual conduct of the trial.

As with any other professional, social science experts expect to be paid for their services. These expert expenses can be substantial even in cases which are settled after the complaint is filed. For example, in the at-large election challenge filed against the Alta Hospital District, I was not reimbursed for expert witness costs. I had to incur $ 4,009.50 in expert witness expenses for a racial voter polarization analysis and a computer consultant who assisted in the computerization of the demographic data. It is not unusual for expert witness expenses in voting rights cases to exceed $ 30,000. To require private

---

groups; 4) candidate slating process which excludes minority participation; 5) the extent to which members of the minority group bear the effects of discrimination in such areas as education, employment, and health, which hinders their ability to participate effectively in the political process; 6) racial appeals in elections; and 7) the extent of minority electoral success.

practitioners to absorb these necessary costs without any expectation of reimbursement will only discourage the private bar from undertaking these voting rights cases. For these reasons, the attorneys' fees provision of the Voting Rights Act, 42 U.S.C. § 1973 l (e), should be specifically amended to include the expenses and fees associated with the use of expert consultants and witnesses.

Conclusion

To eliminate discriminatory election structures, private enforcement of the Voting Rights Act will be necessary. Participation by the private bar will be indispensable to the successful prosecution of these types of complex civil cases. However, without adequate compensation provided by enhancements to awards of attorneys' fees and without reimbursement for expert witness fees and expenses, such cases will not be filed. We will have a Voting Rights Act in name only. If Congress provides the means for effective private enforcement of the Voting Rights Act, then the political integration of disenfranchised minorities can commence. Only by having private enforcement of the Voting Rights Act will minorities have an equal opportunity to participate in the political process and elect candidates of their choice.

Mr. **EDWARDS**. Timothy O'Rourke is affiliated with the Center for Public Service at the University of Virginia. Mr. O'Rourke is the author of "Voting Rights Under The Constitution"—that is the name of the book, "Voting Rights Under The Constitution: An Historical and Contemporary View"—as well as numerous articles pertaining to voting rights and the Supreme Court.

Mr. O'Rourke, you are welcome, and you may proceed.

STATEMENT OF TIMOTHY G. O'ROURKE, CENTER FOR PUBLIC SERVICE, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VA

Mr. **O'ROURKE**. Mr. Chairman, I appreciate the opportunity to appear before you today.

My comments focus on the need to amend the Voting Rights Act, especially in light of the Supreme Court's decision in *Presley*. In the interests of time, I will offer a summary of my views on that case and then offer more extended comments on other voting rights developments that I think bear on the question of amending present law.

With respect to the *Presley* decision, I believe the case was correctly decided. It does not represent a contraction of the scope of preclearance under section 5. Indeed, the Solicitor General, in his brief for the United States as amicus curiae supporting the appellant, conceded, "that the Court had not previously decided whether changes in the powers of an elected official or group of officials are covered by section 5."

As Justice Kennedy observed in *Presley*, there is no principled basis on which to distinguish between those allocational changes that are subject to preclearance and those that are not.

Finally with respect to the decision, the extension of preclearance to cover the reallocations of authority at issue in *Presley* would intrude on considerations of federalism. As Justice Kennedy noted for the majority, covered jurisdictions "must be allowed both predictability and efficiency in structuring their governing arrangements."

Even if section 5 were extended only to some limited number of changes in internal governing procedures, the scope of preclearance would inevitably be expanded to cover a much broader array of changes. Some jurisdictions would submit uncovered changes so as to avoid the risk of violating section 5. Moreover, preclearance of one category of changes would undoubtedly lead to Justice Department and private litigants to identify other changes with the potential for discrimination since again, as Justice Kennedy pointed out, every decision by government implicates voting.

Even though covered areas have had a long experience with section 5, the extension of preclearance to *Presley*-type changes would impose substantially greater burdens of compliance on covered governments. Because section 5 now applies to changes affecting voting in elections, covered States and localities can anticipate those changes as the election schedule requires, make alterations in election and voting rules sufficiently in advance of scheduled elections so as to allow time for the new rules to be precleared.

Even so, of course, covered jurisdictions run afoul of the preclearance process and sometimes are forced to postpone elections. Changes involving the internal allocation of power in contrast to electoral changes are likely to be more frequent and less predictable and thus more disruptive for covered areas.

Frankly, Mr. Chairman, my experience in looking at the performance of local government in Virginia is that there are a number of instances in which black candidates are elected at large to city, county, and town governing bodies. There are cases such as Roanoke and Fredericksburg Cities that are roughly one-fifth black which have elected black mayors directly at large, and there are any number of instances in which the chairman or mayor of local governing bodies in which blacks have been chosen to be chairman or mayor by their colleagues on those bodies.

This is not to say that Virginia has achieved the sort of record on voting rights that one would hold up to the Nation, but my point is to suggest that the record, to the extent that we know it, in Etowah County may not be typical of covered jurisdictions throughout the Southern States.

Because, in my view, *Presley* was correctly decided, there is no need for Congress to amend the Voting Rights Act in order to undo the Court's holding in that case. Should this subcommittee, however, decide to pursue in earnest the possibility of revising the standards for preclearance of section 5, I would recommend that it consider the adoption of clear substantive standards to govern the Justice Department's oversight of legislative redistricting.

In the wake of the 1990 census and the latest round of congressional, State legislative, and local redistricting, the preclearance process has spun out of control, generating a series of outcomes that should alarm all of those concerned about the goals of fair representation and broad citizen participation.

Consider, for example, the new congressional districting maps for Texas and North Carolina. One of the Texas districts, the 29th in Houston, served as a kind of centerfold for Harper's magazine, a monstrous hydra of such complexity and ingenuity that references to the dragons and salamanders of yesteryear's gerrymanders seem wholly inadequate.

The new congressional districts of North Carolina to which Congressman Hyde made reference may have created the modern standard for creative cartography, proving that even contiguity can be turned into a metaphysical concept in suggesting that interstate highways not only make good roads but also make good districts.

The contortions of these maps, which have been duplicated to a greater or lesser degree in States such as Georgia and Virginia and in noncovered States such as Illinois, are to a large extent the result of judicial interpretations of the 1982 amendments to the Voting Rights Act and the Justice Department's insistence that section 5 requires that black or Hispanic majority districts be created wherever possible.

To be sure, the Justice Department is not wholly responsible for the results of recent redistricting activity. Other factors, including the commands of one person/one vote, the new computer technology, and partisan and incumbent interests have come into play.

Beyond question, some good will come from the new maps. The 1990 elections will substantially enlarge black and Hispanic representation in Congress and State legislatures, but these gains, I submit, will come at considerable cost. One cost is the Justice Department's embrace of the notion that black and Hispanic candidates can only succeed in racially segregated electorates, an expectation that, of course, is belied by Virginia's own experience.

The endorsement of racial separatism in elections is at odds with the intent of the 1982 Voting Rights Act amendments which rejected a standard of racial proportionality in elections and at odds with the slow but steady growth in the number of minority candidates, some of whom I referred to, who win elections on the basis of biracial coalitions.

A second important cost in this redistricting has been the abandonment of the idea that congressional and State legislative districts ought to correspond to local subdivisions, cities, or counties, or communities of interest that ordinary citizens recognize. In the short run, voter confusion is likely to rise, and in the long run such districts are likely to encourage the further alienation of citizens from the political system.

Significantly, one prestigious journal has even suggested that the creation of a larger number of black majority congressional districts may have the paradoxical effect of reducing black turnout.

Modern redistricting has become a kind of political strip-mining operation, ravaging the electoral landscape for a quick return in the form of an additional number of safe minority seats and protecting entrenched incumbent or partisan interests. The immediate effect of such strip-mining is an obvious blight upon the landscape as candidates and citizens alike try to make sense of ugly district lines that follow no logic of geography except race and partisan interest. The long-term effect, I fear, will be a continuing pollution of the political system, the dangerous runoff produced by disaffected citizens who decide voting is no longer worth the trouble. Indeed, one must ask quite candidly whether the most recent round of redistricting has brought us closer or moved us further away from the achievement of the goals that animate the Voting Rights Act, the goal of full participation of all citizens in the electoral process and the goal of fair representation for all citizens of whatever color in legislative bodies throughout the Nation. I would submit that the evidence is not all that encouraging.

Thank you.

Mr. EDWARDS. Thank you, Mr. O'Rourke.

[The prepared statement of Mr. O'Rourke follows:]

PREPARED STATEMENT OF TIMOTHY G. O'ROURKE, PROFESSOR, CENTER FOR PUBLIC SERVICE, UNIVERSITY OF VIRGINIA

My name is Timothy O'Rourke. I am Professor in the Center for Public Service at the University of Virginia. I have written several law review articles about the Voting Rights Act and have served as expert in voting rights litigation. For the past ten years, I have taught a course in voting rights and redistricting issues at the University. I have been invited to comment on the need to amend to the act, especially in light of the Supreme Court's decision in *Presley v. Etowah County*, 60 LW 4135 (1992). I, therefore, offer my views on that case and on other voting rights developments that bear on the question of amending present law. The opinions that I present are mine alone and do not represent the views of the Center for Public Service or the University of Virginia.

Overview of *Presley v. Etowah County*

This case raised the question of whether Section 5 of the Voting Rights Act applied to "certain changes in decisionmaking authority of the elected members of two different [Alabama] county commissions." (60 LW 4136) Prior to 1986, Etowah County had elected a five-member commission at large, with four members elected from residency districts and one (the chairman) purely at large. Road funds were divided among the residency district commissioners, each of whom oversaw road work in his respective district. The chairman prepared the budget, managed the courthouse, and supervised the county landfill. Under a 1986 consent decree, the county abandoned its at-large system in favor of a six-member commission elected by wards. Under the first phase of implementation, two ward commissioners--one white, one black--were elected to join the four holdover residency district commissioners. The four holdovers subsequently voted, over the objections of the two new members, (1) to retain control over the road shops and (2) to end the practice of dividing up the road funds, putting them instead in a common account.

A three-judge court (Middle District, Alabama) held that the first change was subject to preclearance, while the second was not. Etowah County subsequently repealed the first change, so that only the second was before the Supreme Court.

During the 1970s, Russell County operated with a system comparable to that which had existed in Etowah prior to 1986. In the wake of a scandal involving one of the residency district commissioners, however, the Russell County Commission transferred supervision of road maintenance to a county engineer. In 1986, two blacks were elected to the Russell Commission under a 1985 consent decree that had expanded the commission and substituted ward for at-large elections. The three-judge court held that the Russell's 1979 change was not covered by Section 5.

In a 6-3 decision, the Supreme Court held that neither change was subject to preclearance. Writing for the Court, Justice Anthony M. Kennedy argued that neither was a change "with respect to voting" within the meaning of Section 5, but was instead a change in "the internal operations of an elected body."[1] (60 LW 4138) To adopt a different reading of the statute, said Justice Kennedy, "would work an unconstrained expansion of its coverage." If "routine matters of governance" were subject to preclearance, he asserted, "neither state nor local governments could exercise power in a responsible manner within the federal system." (60 LW 4139)

In a dissenting opinion joined by two other justices, Justice John Paul Stevens asserted that both changes should be subject to preclearance. A reallocation of internal authority could, in the same

---

[1] According to the Court's reading of the history of the statute, section 5 applies to changes affecting (1) "the manner of voting," (2) candidate qualifications, (3) "the composition of the electorate," and (4) "the creation or abolition of elected office." "[E]ach [category]," said Justice Kennedy, "has a direct relation to voting and the election process." (60 LW 4138)

fashion as a switch from ward to at-large elections, increase "the power of the majority over a segment of the political community that might otherwise be adequately represented." (60 LW 4144)

Observations about the *Presley* Decision

1. The Presley case was correctly decided.

While *Presley* addressed the immediate question of whether section 5 applies to changes in the internal allocation of power, it implicitly raised a more fundamental question about the ultimate purpose and scope of the Voting Rights Act. Justice Stevens claimed that the Court's opinion "leaves covered states free . . . to undermine the authority of an elected official, who happens to be black, to another official or group controlled by the majority." (60 LW 4144) That argument suggests that the objective of the Voting Rights Act is to secure not only an equal opportunity for minority group members to elect candidates of choice, but also an equal opportunity to influence the outcome of legislative deliberations. It is, no doubt, possible to imagine instances in which black or Hispanic candidates, once elected to office, might be relatively powerless to shape legislative decisionmaking because they are consistently outvoted by antagonistic white majorities.[1] However deplorable such situations might be, it is hard to see how Section 5 of the Voting Rights Act might be employed to prevent such outcomes, except by the most radical expansion of the scope of preclearance to cover every kind of situation *in which* majorities can outvote minorities in legislative settings. The majority in *Presley* was rightly reluctant to endorse this expansion, in the absence of clear guidance from Congress and a clear demonstration that racial minorities are, in fact, locked out of legislative deliberations in a significant number of covered jurisdictions.[3]

---

[1] Indeed, Etowah County may fit this profile, since the commission changed its internal rules immediately after a new black member was elected. The record, however, is not entirely clear on this point. The change at issue in the *Presley* case was adopted after two new ward commissioners (one of them black) joined the four residency district holdovers. Because the old residency districts and new ward districts overlapped, the commission may have had to have made some alterations in the old methods of doing business.

2. *Presley* does not represent a contraction of the scope of preclearance under section 5.

The Justice Department, in its Brief for the United States as *Amicus Curiae* Supporting Appellant, conceded that the "Court had not [previously] decided whether changes in the powers of an elected official or group of officials are covered by Section 5." (*Amicus* Brief at 13.) Although the Department itself had decided by 1987 that at least some of these changes should be covered by Section 5, it had not developed a rule to indicate what changes were subject to coverage. (*Amicus* Brief at 17) Indeed, the Department's Section 5 regulations--which are intended to serve as a guide to covered jurisdictions--do not offer any hint that the changes at issue in *Presley* are subject to preclearance. (See 28 CFR §§51.13, 51.15, 51.57-51.61.)

While the Department cited *City of Lockhart* v. *United States*, 460 U.S. 125 (1983) in support of the position that at least "some reallocations of authority are covered by Section 5" (*Amicus* Brief at 9, 13), the expansion of the size of an elected city commission from three to five members (in Lockhart) clearly was an alteration affecting voting directly. In a similar vein, the Department cited eight instances in which it had objected to "transfers of authority" since 1975, but none clearly duplicated the circumstances in Etowah and Russell county. At least three (perhaps four) involved the transfer of authority from a state legislative delegation to a county council, one concerned the consolidation of separate city and county governing bodies, and another centered on the shift in voter registration responsibilities from one official to another. (See 60 LW 4141, n. 3, Stevens, J., dissenting; and *Amicus* Brief at 16-17, n. 6.)

---

[3] The majority in *Presley* recognised that the changes at issue might be "actionable under a different remedial scheme." (60 LW 4140) The change in Etowah County may have violated the consent order that established the ward election system. (60 LW 4144, n. 23, Stevens, J., dissenting)

3. As Justice Kennedy observed in *Presley*, there is no principled basis on which to distinguish between those allocational changes that are subject to preclearance and those that are not.

Justice Stevens, in his dissenting opinion, embraced the broad preclearance standard advocated by the Department of Justice in its *Amicus* Brief.[4] The Department argued that "[c]hanges that affect an elected official's authority to make decisions--to legislate, tax, spend, set school curricula, approve road and bridge projects, and so forth--go to the core of the citizens' voting power." (*Amicus* Brief at 18) Of course, virtually every decision that a legislative body makes about internal operations--ranging from rules of order to the creation of, and assignment of members to, committees--"affect an elected official's authority." Perhaps to avoid a construction of Section 5 that would encompass every change affecting authority, the Department suggested that certain alterations would not fall within the scope of section 5. For instance, "a transfer of authority from a legislative body to a committee to make recommendations concerning proposed legislation would not be covered by Section 5, because the entire body retains the authority to decide whether to adopt the legislation." (*Amicus Brief* at 18, n. 7)

---

[4] To answer the *Presley* majority's call for a narrow rule to govern preclearance, Justice Stevens suggested that preclearance might be limited to changes in decisionmaking authority made after the election of black candidate under a consent decree in a voting rights case. Under that rule, section 5 would not cover the change in governance in Russell County, which took place under apparently race-neutral circumstances, but section 5 would apply to the change in Etowah County. (60 LW 4144) Since Justice Stevens preferred a "broader standard" encompassing both changes, he apparently offered the narrow rule to show that a compromise between his position and the majority's was possible. Although the *Washington Post* endorsed the narrow rule (Editorial, February 12, 1992, p. A22), it is plainly defective, departing from the long-settled interpretation of section 5. As the Justice Department noted in *Amicus* Brief (at 22-23), the application of section 5 presents two distinct questions, (1) whether a change is subject to preclearance and (2) whether the change is not discriminatory in purpose or effect (and should thus be precleared). For instance, Section 5 applies to redistrictings or annexations, without regard to the circumstances under which they take place. Justice Stevens' narrow rule combines the questions of whether a change should be covered and whether it should be precleared, so that section 5 would apply only to governing rules adopted under certain situations. But it is the investigation of those circumstances that is at the heart of preclearance review; changes that appear to race-neutral may turn out to be, on further investigation, discriminatory in either purpose or effect.

The meaning of this illustration, however, is hardly clear. In Etowah County, the full commission retained the authority to allocate appropriations among the various separate commissioners both before and after the change at issue. In other words, the change in question did not alter the authority of the full commission (or the individual commissioners constituting a majority of the full commission); it altered the usual way that the full commission, in practice, allocated such funds. While it appears that the Etowah County case would accord with the Department's illustration of the kind of change that would not be covered by Section 5, the Department, of course, came to the opposite conclusion.

4. Extension of preclearance to cover the reallocations of authority at issue in *Presley* would intrude on considerations of federalism.

As Justice Kennedy noted in his opinion for the Court in *Presley*, covered jurisdictions "must be allowed both predictability and efficiency in structuring" their governing arrangements. Even if Section 5 were extended only to some limited number of changes in internal governing procedures, the scope of preclearance would inevitably be expanded to cover a much broader array of changes. Some jurisdictions would submit uncovered changes so as to avoid the risk of violating Section 5. Moreover, preclearance of one category of changes would undoubtedly lead the Justice Department and private litigants to identify other changes with the potential for discrimination, since, as Justice Kennedy pointed out, "every decision by government implicates voting." (60 LW 4139)

Even though covered areas have had a long experience with Section 5, the extension of preclearance to *Presley*-type changes would impose substantially greater burdens of compliance on covered governments. Because Section 5 now applies to changes affecting voting and elections, covered states and localities can plan ahead, making alterations in election and voting rules sufficiently in advance of scheduled elections so as to allow time for new rules to be precleared. Even so, covered areas run afoul of the preclearance process and are sometimes forced to postpone elections. Changes involving internal allocations of powers, in contrast to electoral changes, are likely to be more frequent and less predictable--and thus more disruptive for covered areas.[8]

---

[8] Justice Stevens, in his dissenting opinion, argued that the extension of preclearance to *Presley*-type changes would not impose any new burdens on covered jurisdictions. He noted that the Justice Department had dealt with more than 17,000 preclearance requests in the current fiscal year and approved 99 percent of them in timely fashion. But he did not take into account the fact that the changes at issue in *Presley* were different in kind from the changes that jurisdictions had been submitting. Moreover, he offered no estimate on the increased number of submissions that might result from the coverage of *Presley*-type submissions.

Amending the Voting Rights Act

Because *Presley* was correctly decided, there is no need for Congress to amend the Voting Rights Act in order to undo the Court's holding in that case. Should this Committee decide to pursue in earnest the possibility of revising the standards for preclearance of Section 5, I would recommend that it consider the adoption of clear, substantive standards to govern the Justice Department's oversight of legislative redistricting.

In the wake of the 1990 census and the latest round of congressional, state legislative, and local redistricting, the preclearance process has spun out of control, generating a series of outcomes that should alarm all of those concerned about the goals of fair representation and broad citizen participation. Consider, for example, the new congressional districting maps for Texas and North Carolina. One of the Texas districts--the 29th in Houston--served as a kind of centerfold for *Harper's Magazine*, a monstrous hydra of such complexity and ingenuity that references to the dragons and salamanders of yesteryear's gerrymanders seem wholly inadequate.[6] The new congressional districts in North Carolina may have created the modern standard for creative cartography, proving that even contiguity can be turned into a metaphysical concept and suggesting that Interstate Highways not only make good road but also make good districts.[7]

The contortions of these maps, which have been duplicated to a greater or lesser degree in states such as Georgia and Virginia (and in non-Section 5 states such as Illinois), are to a large extent, the result of judicial interpretations of the 1982 amendments to Voting Rights Act and the Justice Department's insistence that Section 5 (and Section 2) requires that black or Hispanic majority districts be created wherever possible. To be sure, the Justice Department is not wholly responsible for the results of recent redistricting activity; other factors--the commands of "one person, one vote," new computer technology, and partisan and incumbent interests--have come into play.

---

[6] Michael Tomasky, "Out-of-Bounds Lines?" 284 Harper's Magazine 56-57 (March 1992).

[7] One North Carolina district follows I-85 for about 175 miles, running from Durham to Charlotte. For further discussion and maps of congressional districts in North Carolina, Texas, and other states, see "Special Report: Election '92," 50 *Congressional Quarterly Weekly Report* (Supplement, February 29, 1992).

Beyond question, some good will come from the new maps. The 1992 elections will substantially enlarge black and Hispanic representation in Congress and state legislatures. But these gains will come at considerable cost. One cost is the Justice Department's embrace of the notion that black and Hispanic candidates can only succeed in racially segregated electorates. The endorsement of racial separatism in elections is at odds with the intent of the 1982 Voting Rights Act Amendments, which rejected a standard of racial proportionality in elections, and at odds with the slow, but steady growth in the number of minority candidates who win elections on the basis of biracial coalitions.

A second important cost has been the abandonment of the idea that congressional and state legislative districts ought to correspond to local subdivisions or communities of interest that ordinary citizens recognize. In the short run, voter confusion is likely to rise and in the long run, such districts are likely to encourage the further alienation of citizens from the political system. Significantly, one prestigious journal has even suggested that the creation of a larger number of black-majority congressional districts may have the paradoxical effect of reducing black turnout.[8]

Modern redistricting has become a kind of political strip mining operation, ravaging the electoral landscape for a quick return in the form of additional number of safe minority seats and protecting entrenched incumbent or partisan interests. The immediate effect of such strip mining is an obvious blight upon the landscape, as candidates and citizens alike try to make sense of ugly district lines that follow no logic of geography except race and partisan interest. The long term effect will be a continuing pollution of the political system, the dangerous run-off produced by disaffected citizens who decide voting is no longer worth the trouble. Indeed, one must ask--candidly--whether the most recent round of redistricting has brought us closer or moved us further away from the achievement of the goals that animate the Voting Rights Act--the goal of full participation of all citizens in the electoral process and the goal of fair representation for all citizens of whatever color in legislative bodies throughout the nation. I would submit that the evidence is not at all encouraging.

---

[8] Beth Donovan, "New 'Majority Minority' Districts May Mean Lower Black Turnout," 50 *Congressional Quarterly Weekly Report* 563-65 (March 7, 1992).

Mr. **EDWARDS**. Do you have evidence of the opposite, that it is not working to the public's disadvantage or to the minority citizens' disadvantage?

Mr. **O'ROURKE**. We have experience in Virginia from the most recent round of State legislative redistricting, because Virginia holds State legislative and gubernatorial elections in odd years. In 1991, the State chose its State senate and State house, and voter confusion was endemic. There were a number of instances in which voters were uncertain which candidates they were voting for because of the new complexity in State legislative districting.

It used to be two decades ago, even a decade ago, in Virginia that the building blocks of State legislative districts and congressional districts as well—the building blocks were cities and counties, and city and county boundary lines were breached only as necessary.

The building blocks of contemporary districts are precincts and, in some instances, blocks within precincts, and one need only compare the maps produced after the 1980 census with the maps after the 1990 census. One could take, for example, the congressional district lines that have just been produced by the State legislature for the 1992 elections in Virginia, a rather radical departure from the tradition of compact, contiguous districts in Virginia that follow city and county boundary lines.

I think the experience of the Governor suggests that it is not necessary to draw majority black congressional districts in order for a black candidate to successfully compete for election to Congress.

Mr. **EDWARDS**. Thank you.

Mr. Avila, do you think it would be difficult to write an amendment or a statute that would appropriately address the problem created by *Presley?*

Mr. **AVILA**. I think, as testified earlier by Frank Parker, such statutory language is easily draftable, and I think if you just clearly limit it to those transfers of decisionmaking power, I think you avoid the kinds of problems that were highlighted by Justice Kennedy.

Mr. **EDWARDS**. Justice Kennedy is a fellow Californian. He is a very conservative jurist, as you know.

Mr. **AVILA**. Yes.

Mr. **EDWARDS**. Counsel.

Ms. **BARNES**. Mr. O'Rourke, you cited cases in your testimony where blacks have achieved electoral success. However, there are many other cases that exist where people of color have not achieved that kind of success and are prevented from participating effectively in the voting process. Don't you think it is the job of the Department of Justice to ensure and to look at certain cases to ensure that such voters get the opportunity to participate in the voting process, and, in light of our history, do you think that we can assume that discrimination doesn't exist to the extent that the Justice Department shouldn't have that function?

Mr. **O'ROURKE**. I absolutely believe the Justice Department should have that function, and I would not make the argument that preclearance should be suspended. I think preclearance should be continued, but I think that preclearance has worked in the wake of the 1990 census to impose a very different obligation upon State legislatures and local governing bodies then existed either after the

1980 census or the 1970 census, and I would suggest that after 1980 the obligation of local governments and State legislatures was to commit no acts of discrimination. Now they operate under an affirmative obligation to create safe minority districts wherever possible. I think that that represents a substantial reorientation of the act.

But to reiterate, I think that it is important that the Justice Department monitor the performance of covered jurisdictions to ensure that they do not engage in acts of discrimination.

Ms. BARNES. I mean we are beyond looking at the cases of redistricting, we are also talking about cases that exist in the *Presley* decision where elected officials were stripped of their powers and the powers that the voters elected them to carry out.

It seems to me that that is the kind of case we want to look at and decide whether or not discrimination has taken place, whether or not they were acting in good faith or whether or not they were acting to overturn the vote of the people of color in that district.

Mr. O'ROURKE. I think the *Presley* case raises several issues. I think that Justice Kennedy quite properly drew a distinction between changes affecting voting and changes affecting governance.

With all due respect, I think that section 5 covers changes respecting voting, not changes respecting governance, although those changes in internal procedures certainly can be discriminatory.

I think that in the first instance so substantial a change in the meaning of section 5 is not one for the Supreme Court to make or for the Justice Department to make, it is one for the Congress to make, and if Congress, in its wisdom, decides to make that change, then so be it, and I assume that if Congress were to do that it would look not only at Etowah County but would consider the range of experiences throughout the South, and I would submit that perhaps Etowah County's experience is not necessarily typical.

I guess I would add to that that, for me, the *Etowah County* case is a bit confusing. What stands out, of course, is that following the election of the first black member in modern times, the commission changed its rules, and so the initial impulse is to see this as an egregious example of racial discrimination thinly disguised.

A problem with that interpretation—and those who are more familiar with the facts of the case might enlighten me about this, but a problem with that interpretation is that the nature of the commission had been so changed that it was not clear that it could operate under the terms of its old rules. It had previously operated under a system in which the residency district commissioners had, in effect, had a share of the budget and administered road construction within their own respective districts, but what happened in 1986 when a black and white commissioner were elected was that you had these two ward commissioners joined with four holdover members, the four residency district commissioners, so, in fact, that there was some overlay of districts between the new ward members and the four residency district commissioners. So it seems almost inevitable that some change in governing procedures was required by the very nature of the staggered implementation of this system.

Two other observations I would make. I share Professor Thernstrom's observation that if this doesn't violate section 5 it might violate some other civil rights statute, and, as I read the case, it might even violate the consent order that created the new ward election plan for the Etowah County Commission.

A final observation, though, is that if you have a board of commissioners hell bent on excluding a new minority member from participation, it seems to me that that discrimination would be reflected in an array of internal governing procedures that went well beyond the allocation of the budget, would extend to committee assignments, to the allocation of responsibility to committees, it would permeate every issue over which that commission had control, and if we adopted a preclearance standard that covered changes in which there was some possibility for discrimination based on the experience of a commission hell bent on discrimination, then it would mean that section 5 would cover any kind of change in an internal governing procedure, and it seems to me that, rather than extending section 5 to encompass that whole panoply of changes—and we don't have much evidence that problems of Etowah County are extensive, but it seems to me that it would be better to litigate these issues under a different framework, and that is what I understand to be the recommendation of Justice Kennedy.

Ms. BARNES. Do Mr. Avila or Professor Shaw have any response to my questions or Mr. O'Rourke's comments?

Mr. AVILA. I think the practical reality of it is that even though changes in governance or changes in decisionmaking power may not go down all the way down to changes in structures or procedures for making committee assignments, the reality is that when you are dealing with governmental funds, such as road funds and so on, that that is a very important part of the political power, and I guess for all the reasons that were just identified I think it convinces me that there is even a greater necessity to have these kinds of decisions to be scrutinized by the Department of Justice, which has the experience of approving changes which don't have a discriminatory effect and apply those to those changes—that whole experience, all of that experience, to apply it to changes which effect changes in decisionmaking powers.

To say that there are other litigation alternatives that are available to challenge these kinds of things—the options are very limited. You can probably institute a 14th amendment challenge, but then you are confronted with the Supreme Court's intent requirement, you would have to show a specific intent to discriminate, and, as we all know in this day and age, people are not going to put in the preamble of their ordinance changing a decisionmaking process that, "I am doing this to limit the authority of the newly elected minority member." That is why we need section 5 review for these kinds of changes.

Mr. SHAW. I would join Mr. Avila's comments, and I want to point out that *Presley* was two cases and that I'm not sure that the proper explanation for what was happening in the *Presley* case actually accounts for what was happening in the second case.

In any event, it seems to me that the question, as I said earlier, really isn't so much whether section 5 covered these kinds of practices before—although I think that section 5 could have been read to cover them before—that there was precedent that—at least some language that suggested that the Court was concerned about these kinds of practices. The question is whether we are content and comfortable with the result that the Supreme Court has given us—that is to say whether we are comfortable with a scenario where the Voting Rights Act has nothing to say about a governmental body changing the rules and effectively gutting the significance of the right to vote, and if we are not comfortable with that, then I think we need to act on it.

On another point with respect to representation in Virginia, I am told that black representation in the Virginia Senate increased from three to five last year, but it was as a result of the increase in the number of majority black districts.

So again, while there are exceptions to the racially polarized voting pattern, it seems to me that there is still a sufficiently strong link between voters' racial identity and the racial identity of candidates so that we haven't reached the point yet where we can begin to talk about the kinds of prophylactic measures as have been provided pursuant to Voting Rights Act litigation. We can't talk about abandoning those types of measures; we are still dealing with those realities.

Finally, on the *Presley* issue, I neglected to say that with respect to the effect of *Presley* and also whether or not other jurisdictions would be either likely to engage in similar conduct or whether jurisdictions have, in fact, engaged in similar conduct, the NAACP Legal Defense Fund I know is planning to submit further evidence into the record here which would shed some light on *Presley*-type practices.

Mr. EDWARDS. Mr. Avila, in one sentence or so, what do you think the Court did in *Presley?*

Mr. AVILA. I think, as I stated earlier, the Court provided a blueprint to entrenched Anglo politicians of how to maintain their power, and I think unless Congress does something about it we are going to see that section 5 is going to be gutted in essence, because we are going to see jurisdictions adopting changes in minor things—seemingly minor things, such as setting agendas, as was done in, I believe, the Victoria Independent School District, a case that was filed by the Mexican American Legal Defense Funds.

These kinds of changes in governmental decisionmaking authorities is something that we can expect to see.

Mr. EDWARDS. Anybody can answer this. In the publicity surrounding the case, not necessarily in the Court but when it took place, was there in the newspaper or was there some discussion about what the real reason was that the commissioners were doing this?

Mr. AVILA. I can't speak to that; no, sir.

Mr. SHAW. I don't know. My just intuitive guess is that there probably was at least—if there was a black newspaper, there probably was, but I don't know for sure.

Mr. EDWARDS. When we were many years ago considering in this subcommittee effects versus intent, we eventually changed some of the laws so that the effect would be, rather than intent, the guiding principle.

Going back 100 years ago or so, the intention of a particular city council would have to be proved, and it just wouldn't work at all.

I'm just curious to know if this was a nefarious plan to get around the Voting Rights Act.

Mr. **Avila**. I think you have just outlined the difficulties in proving that in a traditional type of lawsuit involving an intent requirement in that you would have to try to get at the individual motives of the individual persons, and they would be able to use the kind of justifications that were provided earlier in that we have too many people on the board and therefore we need to change the rules.

There were probably other alternatives that could have been devised and implemented that wouldn't have resulted in the same kind of impact, and that is why you need to evaluate the effects of the change, and that is why it needs to be done in the context of the Voting Rights Act.

Mr. **O'Rourke**. Two points, Mr. Chairman, if I might.

Mr. **Edwards**. Yes.

Mr. **O'Rourke**. My colleague at the table mentioned the other case involved in *Presley*. In Russell County, the change at issue was adopted I think 7 years before the election of the first black commissioners to serve on the Russell County Commission, so it took place under circumstances that presumably were race neutral. That doesn't in the final analysis address whether this kind of change is subject to the preclearance under section 5, but it does suggest that there are very different circumstances, and, in fact, when the Washington Post editorialized about the case, it thought that the preclearance should apply to Etowah County but not the Russell County change.

A second point I would make is that Justice Stevens, in his dissent, referred to the fact that the Justice Department received something in excess of 17,000 requests or submissions in the current fiscal year. Most of those submissions have to do with voting, and if we assume, as I do, that changes in internal governing rules, budgetary decisions, are far more frequent than the kinds of changes that are related to voting, then we are talking not about a trickle of new submissions to the Justice Department but a manifold increase in the number of changes that are submitted to the Justice Department, and unless, in fact, you articulate a very clear standard for the kinds of changes that are subject to preclearance, one can imagine that these changes will simply overwhelm the Department.

Mr. **Edwards**. I don't think we can accept that. If the amendment is carefully drawn, I don't know why it would result in any more increase, but we will see.

Minority Counsel.

Ms. **Hazeem**. No questions, Mr. Chairman.

Mr. **Edwards**. Well, thank you very much. It has been very helpful.

This concludes the hearing, and we plan to move within 2 or 3 weeks into a markup.

[Whereupon, at 12:52 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARINGS

Leah Harjo Ware
Muskoke (Creek) / Yuchi
Attorney at Law
2200 Kingwood • Moore, Oklahoma 73160 • 405 / 799-0968

April 28, 1992

The Honorable Don Edwards
United States House of Representatives
Washington, D.C.

Re: Reauthorization of Section 203 of the Voting Rights Act.

Dear Representative Edwards:

I cannot begin to express to you how important it is to Indian people to have Section 203 reauthorized. I am personally acquainted with numerous full blood and even some lesser blood Indian citizens of our United States who speak predominently if not exclusively their native languages. It is crucial for these people to have benefit of language assistance to participate in our electoral process. A high degree of frustration exists today among many native speakers because of language difficulty that many citizens fail to participate in the electoral process altogether.

I urge your support of the reauthorization of Section 203 of the Voting Rights Act.

Sincerely,

Leah Harjo Ware

Leah Harjo Ware
Attorney General
Muscogee Nation
President
Muscogee Nation Bar Association

OKLAHOMA INDIAN BAR ASSOCIATION
P.O. BOX 1062
OKLAHOMA CITY, OKLAHOMA 73101

The Honorable Don Edwards
United States House of Representatives
Washington D. C.

Re: Reauthorization of Section 203, Voting Rights Act and Proposed Amendments

The Oklahoma Indian Bar Association (OIBA) is an organization consisting of local practicing attorneys who have an interest in Indian law or who practice in the field of Indian law. The OIBA supports the reauthorization of Section 203 of the federal Voting Rights Act. Section 203 requires that language assistance be given in Native American languages by certain counties in the electoral process. The 1990 Census reveals that Oklahoma has the largest Indian population (252,420) of any state. The largest minority population in Oklahoma consists of American Indians. The potential for negative impact is therefore greatest in this state.

If Section 203 is not reauthorized, no Indian speakers residing in Oklahoma, New Mexico, Montana, North Dakota, Utah or Wisconsin will receive language assistance under federal law. In fact it would seem absurd that an individual would necessarily have to give up his language in return for a right protected by the United States Constitution. Many Indian citizens in these states speak their respective tribal languages and have depended on the oral assistance mandated by Section 203. absent the reauthorization and its mandates many Indian citizens would not be able to participate in elections. It seems readily apparent the reauthorization would prevent disenfranchisement of Indian people simply because they speak traditional languages. This is surely something that we as American citizens can not stand for.

The current coverage formula in Section 203 uses county voting age population as a standard of comparison rather than "the reservation's Native American voting age population" in assessing whether a county must provide language assistance to Indian language speakers. Because of the flaw in the formula, it fails to identify many citizens who could benefit from the assistance.

The current coverage formula fails to consider the unique history and demography of Oklahoma Indian tribes and nations. Reservation boundaries in this state with the exception of one or two tribes have never been extinquished. As with other states, state lines were superimposed on preexisting reservations. In Oklahoma this occured after statehood in 1907. It just makes more sense that if Section 203 is reauthorized the coverage formula needs to reflect the specific needs of the groups it was intended to protect.

The right to vote is a fundamental constitutional right of all American citizens which should not be abridged regardless of which language they may speak. The reauthorization and amendments proposed are consistant with the constitutional guarantees and the recently passed federal law, Native American Languages Act of 1990. The languages Act states,"the right of Native Americans to languages shall not be restricted in any public proceeding".

We would urge you and your colleagues, Representive Edwards, to support reauthorization of Section 203, which is to expire in August of 1992. We would urge you to amend the coverage formula as we have suggested as it will further the intent and purpose of the law.

Sincerely,

Henry C Ware

Henry A. Ware
Civil Rights Chairman

MUSCOGEE (CREEK) NATION
OFFICE OF THE PRINCIPAL CHIEF
PO BOX 580, OKMULGEE, OK 74447 (918) 756-8700

BILL S. FIFE
PRINCIPAL CHIEF
SHELLY STUBBS CROW
SECOND CHIEF

April 24, 1992

The Honorable Don Edwards
House Judiciary Subcommittee
on Civil and Constitutional Rights
806 O'Neill House Office Building
Washington, D.C. 20515
ATTN: Melody Barnes

SUBJECT: § 203 of the Voting Rights Act (Language Assistance Provisions)

Dear Honorable Edwards:

The Muscogee (Creek) Nation supports the extension of §203 for fifteen years, and supports any amendment which broadens the standards for determining which jurisdictions are covered. We oppose both the 10,000 person and 20,000 person benchmark for inclusion within the provisions of this section. We support alternative language to view a tribe as a whole, as our people within the reservation are spread over 11 counties in Oklahoma, and we can document that over 5% of our adult population cannot understand English well enough to participate in the voting process. Please include this statement as a part of the record of the Hearing on §203 which was held on April 1.

For your information, our tribal ordinance regarding regular and special elections requires that sample ballots be available in both English and Mvskoke, both of which are written languages, and procedures are established for voter translation assistance to be provided in other tribal languages where there is no common written form, of which Yuchi is the only language in common use [the Alabama, Quassarte, and Hitchiti languages are no longer in common use] More importantly, all applicants are eligible for translation assistance whenever they apply for enrollment as citizens or for registration as voters.

The State of Oklahoma has not implemented the printed assistance requirements of §203. Instead, the Oklahoma Election Board has determined that all tribal languages within their jurisdiction are "historically unwritten languages" simply because at some time during the historic period these languages were not yet in written form. Tribal members objected to this decision approximately ten years ago, because Mvskoke (the Muscogee language) has been in written form since the 1830's.

The Muscogee Nation supports both printed and verbal translation services. Because of our unusual circumstances, even within Indian Country, it is imperative, however, that the definition of "historically unwritten language" be clear and precise. We propose that the definition specifically NOT include any written tribal language which is in common usage as evidenced by educational, cultural, governmental or religious printed materials which are in widespread use within each jurisdiction.

We hope that this will lead to a increase in printed voter materials being available in Mvskoke. It is important that printed ballot translations be available to persons who are not fluent in English, or to whom English is a secondary language. However, while some may claim that there is no demand for these services, the primary cause is that there have been no printed translations of voter registration materials available for the registration of voters who are not fluent in English, or to whom English is a secondary language. We understand that this is not the case nationwide, and that written materials may not be of use with some tribes, including the Yuchi-speaking people of our own tribe.

While many of our people are bilingual in English and either Mvskoke or Yuchi, we still have many people to whom English is a secondary language which they do not understand well, and who can become confused during the process of mentally translating the English into the tribal language, making their decision, and then translating back from the tribal language into English. In addition, despite 85 years of instruction by the Oklahoma public schools, we still have isolated pockets of families who are monolingual, and who do not understand English except in simple, basic conversational uses. Almost all of these persons are middle-aged or older.

It can be hard to understand how monolingual people "survive" in an English-speaking culture. But whether they visit with their friends and relatives or attend church or ceremonial events, their tribal language is sufficient for communication. Tribal offices always have bilingual people on staff, and many federal Indian services offices also. When other offices are visited, such as doctors and lawyers, where translation services are not always available, monolingual people take a bilingual friend or relative along with them for the purpose of translation. Merchants in these communities understand this, and often have Indians on staff for the purpose of translating as a way of keeping these people as their customers.

But the State and its counties don't see these people as "customers", or at least not as vital and necessary participants in the political process. It would be extremely detrimental to suppose that Oklahoma or its counties would voluntarily provide bilingual assistance: from statehood in 1907 to the adoption of §203 this never occurred, and has been limited to verbal assistance since.

As a tribal government with elections every two years, we understand the need for ballot security. The proposal that the ballot itself be printed in English is not objectionable, provided that registration materials and sample ballots in the written tribal language are available, and that the sample ballots may be taken into the voting booth.

However, the proposal that the electoral process be limited to materials printed in the English language is objectionable. Many of these people have never participated in local, state or federal elections. If translation services are not provided, they never will participate, and local units of government will have no feeling that they are responsible to these constituents on issues of policy, allocation of services, or even the hiring of Indian employees. We have a state school district inside our reservation which has 63% Indian student population, but only has 20% Indian membership on the school board, and no Indian faculty, no tutoring in English as a second language, and no classes in Muscogee culture or history.

After all, it is most important to remember that these are not foreign languages. American Indian languages are native languages. When our tribal members were made U.S. Citizens by Congress in the act of June 2, 1924 [43 Stat., 253], there was no limitation that the citizenship only applied to those persons who spoke English. While some benchmark may be appropriate outside of Indian reservations, it is totally inappropriate inside the tribal boundaries.

Finally, we cite a special treaty right which may not apply to other tribes, from the Treaty of June 14, 1866, between the United States and the Muscogee (Creek) Nation [14 Stat., 785], Article 10:

> The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: *Provided, however,* [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

Your consideration of our comments, and their inclusion in the record of April 1, 1992, is deeply appreciated.

Sincerely,

Bill S. Fife
Principal Chief
Muscogee Nation

cc: Senator David Boren
Senator Don Nickles
Representative Mike Synar
Representative Jim Inhofe
Peg Rogers, Native American Rights Fund

IKWAI
F.O.R.C.E.

"FOUNDATION OF ORGANIZED RESOURCES IN CULTURAL EQUITY"

P O Box 963
Choctaw, OK 73020
(405) 454-3681
(405) 454-2158

April 17, 1992

The Honorable Don Edwards
House Judiciary Subcommittee on Civil and Constitutional Rights
806 O'Neill House Office Building
Washington, D.C. 20515

Dear Congressman Edwards

IKWAI F.O.R.C.E. is a nonprofit community-based organization which provides appropriate supplementary and preparatory services required to assist in meeting the educational, social and economic needs of Native Americans who are located in central Oklahoma.

The IKWAI F.O.R.C.E. Board of Directors wish to express support for S. 2236/H.R. 4312, the Voting Rights Act Language Assistance Amendments of 1992. It is our understanding that the House Judiciary Subcommittee on Civil and Constitutional Rights held a hearing on this bill in early April. We respectfully request that this letter of support become part of the written record of the hearing on s. 203, held on April 1.

Although Oklahoma ranks first in Native American population per capita, only one county (Adair) is currently covered under s.203. An amendment providing an alternative formula would allow Oklahoma's Native American population to have the language assistance needed to allow them to cast informed votes.

IKWAI F.O.R.C.E. supports reauthorizing s. 203 and amending s. 203's coverage formula to better identify Native Americans who need language assistance. We therefore urge Congress to pass this important legislation.

Sincerely,

Doris Beleele

Doris Beleele, Vice-President
IKWAI F.O.R.C.E. Board of Directors

LITERACY VOLUNTEERS of AMERICA Inc

Literacy Volunteers of IKWAI
AFFILIATE OF
Literacy Volunteers of America, Inc

INTERNATIONAL NATIVE AMERICAN LANGUAGE ISSUES NALI INSTITUTE

P.O. Box 963 • Choctaw, OK 73020
Central Office • 405/454-3681 or 454-2158
FAX 405/454-3688

THE NALI INSTITUTE SERVES TO EXAMINE NATIVE LANGUAGE AND CULTURAL CONCERNS AND TO EXCHANGE IDEAS AND PROVIDE DIRECTION FOR THE CONTINUAL DEVELOPMENT OF EDUCATION AND RESEARCH OF THE NATIVE LANGUAGE AND CULTURAL ISSUES IN THE AMERICAS

April 17, 1992

The Honorable Henry Hyde
House Judiciary Subcommittee on Civil and Constitutional Rights
806 O'Neill House Office Building
Washington, D.C. 20515

Dear Congressman Hyde:

NALI is a non-profit organization dedicated to the preservation and continual development of Native language and culture in the Americas. NALI, chartered in Oklahoma, is based in Choctaw, Oklahoma.

The NALI executors, on behalf of the NALI membership, wish to express support for S. 2236/H.R. 4312, the Voting Rights Act Language Assistance Amendments of 1992. It is our understanding that in early April the House Judiciary Subcommittee on Civil and Constitutional Rights held a hearing on this bill. We respectfully request that this letter of support for S.2236/H.R. 4312 become part of the written record of the hearing on April 1.

Oklahoma ranks first in Native American population per capita; yet only one county (Adair) is currently covered under s.203. Oklahoma currently has approximately fifty Title VII bilingual education programs operating in the elementary and secondary schools; an overwhelming majority of these (48) are Native American projects. An amendment providing an alternative formula would allow Oklahoma's Native American population to have the language assistance needed to allow them to cast informed votes.

Oklahoma exemplifies the need for this type of legislation. NALI supports reauthorizing s. 203 and amending s. 203's coverage formula to better identify Native Americans who need language assistance. We therefore urge Congress to pass this important legislation.

Sincerely,

Shirley Brown

Shirley Brown
Executor

EXECUTORS: Shirley Brown • Harlene Green • Doris Beisele • Patricia Locke • Carl Downing • Glenda Barrett
LEGISLATIVE COMMISSION: Patricia Locke • Joan Webkamigad • Verna Graves

**UNITED STATES
COMMISSION ON
CIVIL RIGHTS**

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

June 10, 1992

The Honorable Don Edwards
Committee on the Judiciary
Subcommittee on Civil and
Constitutional Rights
Washington, D.C. 20515

Dear Representative Edwards:

The U.S. Commission on Civil Rights commends you for sponsoring the *Voting Rights Language Assistance Act of 1992* (amendment to H.R. 4312) to extend section 203 of the Voting Rights Act of 1965 to the year 2007. We believe that bilingual voting assistance required by section 203 remains essential to guaranteeing the right to vote to every eligible citizen.

Eighteen years ago the Supreme Court ruled in *Lau v. Nichols* that schools must take affirmative steps to "rectify the language deficiency" of their limited-English-proficient (LEP) students. Since then, however, the Federal Government has not enforced this requirement effectively, and there is strong evidence that public school systems still do not serve the educational needs of the estimated 3.6 million language-minority students.[1] The failure to support adequately bilingual education programs and the general deficiencies of the schools these language-minority children typically attend are responsible for turning out ill-prepared citizens whose command of English, among other educational shortcomings, will impede them from participating fully in the political process.

Even if the inequities that persist in our educational system could be eliminated tomorrow, our present electorate would still include a great many people who were denied equal educational opportunities in the past and, in order to participate fully and effectively in the political process, would need the bilingual assistance mandated by the Voting Rights Act. In addition, the large inflow of immigrants from Asia and Latin America since 1975 and the amnesty granted to more than two million illegal immigrants under the Immigration Reform and Control Act of 1986 will cause the population of eligible voters needing bilingual voting assistance to expand rapidly for at least the next decade.

---

[1] *The Educational Progress of Language Minority Students: Findings from the 1983-1984 NAEP Reading Survey* (Princeton, N.J.: Educational Testing Service, January 1987). See review in *Civil Rights Issues Facing Asian Americans in the 1990s*.

H.R. 4312 will also correct a long-standing flaw in the language provisions of the Voting Rights Act of 1965 by extending coverage to include political subdivisions where more than 10,000 of the citizens of voting age belong to a single language minority. This will enable a large number of citizens who are members of covered language minority groups finally to have their political views heard through the ballot box.

Thank you for the opportunity to present our views on this vital issue.

Sincerely,

ARTHUR A. FLETCHER
Chairperson

U.S. Department of Justice

Civil Rights Division

COPY

Office of the Assistant Attorney General

Washington, D.C. 20530

May 12, 1992

Honorable Don Edwards
Chairman
Subcommittee on Civil and Constitutional Rights
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

It was a pleasure to appear before the Subcommittee on April 8, 1992, to testify regarding, *inter alia*, the extension of section 203 of the Voting Rights Act. This letter supplements the record in connection with an exchange that occurred with Representative Hyde regarding the impact of section 203 on Hispanic voter participation. Representative Hyde suggested that Hispanic voter registration and turnout remained quite low in spite of section 203 and questioned, on that basis, whether section 203 should be extended.

I thank Representative Hyde for highlighting a very serious problem; low electoral participation by Hispanic individuals. In our view, however, the way to address that problem is not by doing less -- *i.e.* eliminating language assistance -- but by redoubling our efforts to ensure that the means of participation are not impeded. As I stated in my testimony, the first-hand experience of our attorneys in the field, federal observers, and the General Accounting Office verify that language assistance does have an impact. It enables minority language voters to cast effective ballots. We continue strongly to urge Congress to enact a 15-year extension.

A variety of factors likely contribute to low Hispanic voter participation. Among these are education levels, socio-economic status, unemployment, and language. Only the last of these factors is addressed by section 203, but we think it important to remove the language barrier to the extent possible.

While the statistics certainly indicate that turnout is low, the Bureau of the Census, in reporting the statistics, has cautioned that the percentage of Hispanics who register and vote is artificially low because of the high percentage of Hispanics who are not citizens. See *Voting and Registration in the Election of November of 1990*, p. 3. Thus, turnout as a percentage of voting age population -- reported as 21% for Hispanics in 1990 -- is a deceptively low figure, since approximately 38% of the voting age population is composed of individuals who are not citizens.

Moreover, we think that it can be misleading to draw conclusions regarding the impact of section 203 from nationwide figures for Hispanic turnout. As you are aware, section 203 does not mandate language assistance nationwide. Rather it is limited to jurisdictions that meet the coverage formula. Thus, large numbers of Hispanics who need language assistance are not reached by section 203 (or by section 4 of the Voting Rights Act), such as the roughly 175,000 Hispanic minority language citizens in Los Angeles County, the 75,000 such citizens in Cook County, and the 43,000 such citizens in Queens. It is, therefore, unpersuasive to suggest that section 203 has not worked when it has not reached large numbers of Hispanic citizens who need language assistance.

There undeniably have been increases in political participation by Hispanics in areas in which language assistance has been available. Not all of these gains are directly attributable to the availability of language assistance, but our experience convinces us that language assistance has been a contributing factor. For example, it has been reported that in the Southwest the number of Hispanics registered to vote doubled between 1976 and 1988, and the number of Hispanics voting increased by 600,000. Similarly between 1973 and 1991, the number of Hispanics holding elected office rose from 1379 to 4202. See _Section 203: Language Assistance Provisions of the Voting Rights Act_, National Council of La Raza (Jan. 1992). Nationwide, the number of Hispanics registered increased by over 2 million between 1974 and 1990 and the number voting increased by approximately 1.5 million over the same period. See U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 453, _Voting and Registration in the Election of November 1990_, Tables A-3 through A-6, Congressional Election Voting and Registration.

Similarly, it is clear that Hispanic voters have used language assistance when it was available. As the General Accounting Office found, in Texas some 85,000 individuals received oral language assistance at the polls in the November 1984 general election and some 69,000 received written assistance. _Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election_, pp. 25, 32 (1986). While we cannot, of course, ascertain how many of these voters were brought to the polls by language assistance, we can conclude that, once they were there, their ability to cast effective ballots was enhanced by language assistance.

Plainly, language assistance is not the complete cure for low Hispanic voter turnout. But, we know that there are large numbers of Hispanic citizens who need language assistance to vote effectively and that when that assistance is available it is used. In our view, extension of section 203 is essential in trying to ensure that all segments of our citizenry have the opportunity to participate meaningfully in the electoral process. We, therefore, continue to urge that Congress act quickly to extend section 203.

Sincerely,

John

John R. Dunne
Assistant Attorney General

cc: Honorable Henry J. Hyde
Ranking Minority Member

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

815 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

LANE KIRKLAND
PRESIDENT

THOMAS R. DONAHUE
SECRETARY-TREASURER

LEGISLATIVE ALERT!

(202) 637-5075

April 16, 1992

Honorable Don Edwards, Chairman
Civil and Constitutional Rights
 Subcommittee
House Committee on the Judiciary
806 O'Neill House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the AFL-CIO, I commend you and the members of your subcommittee for the thorough and thoughtful consideration you have given to the need for the extension of Sec. 203 of the Voting Rights Act, one of the language assistance provisions of that statute. In 1975, the addition of the language assistance provisions to the Voting Rights Act set a public policy course which has assisted thousands of language-minority citizens in exercising their right to vote and to fully participate in our electoral process. This is a public policy course which must be continued, and could be improved.

The AFL-CIO believes Sec. 203 of the current law should be extended for 15 years, to the same 2007 expiration date of all other provisions of the Voting Rights Act. We also believe it is necessary to clarify and improve coverage of the law for those Native Americans living on reservations where the reservations are divided by political lines. And we would urge the subcommittee to give consideration to an alternative to the 5% standard for coverage in order to better target populations in need. For example, in Los Angeles, San Francisco and Chicago where a very large general population overwhelms even a substantial resident language-minority community in need of language assistance, some benchmark should be established to permit coverage under the law.

Language assistance has been shown to have broken down barriers to full electoral participation by language minority citizens and has proven not to be an unreasonable financial burden on the covered political jurisdictions. There exist in our citizenry many older immigrants and Native Americans who have never had the educational opportunity to attain English proficiency and we continue to absorb many newcomers who do not yet have the proficiency to deal with registration and electoral materials in English. These citizens are entitled to exercise their right to vote and need assistance to help them to fulfill this civic responsibility.

The AFL-CIO urges the subcommittee to favorably report legislation which will extend Sec. 203 of the Voting Rights Act and enhance its effectiveness in assuring all citizens a real opportunity to exercise their full rights of citizenship.

I would request that this letter be placed in the record of your hearings on the language assistance provisions of the Voting Rights Act.

Sincerely,

Robert M. McGlotten
Robert M. McGlotten, Director
DEPARTMENT OF LEGISLATION

cc: Members of the Civil and Constitutional Rights Subcommittee

ILEANA ROS-LEHTINEN
18TH DISTRICT, FLORIDA

COMMITTEES

FOREIGN AFFAIRS

GOVERNMENT OPERATIONS

Congreſs of the United States
House of Representatives

PLEASE RESPOND TO

☐ 416 Cannon Building
Washington DC 20515-0918
(202) 225-3931

DISTRICT OFFICE

☐ 5757 Blue Lagoon Drive
(NW 11th Street)
Suite 240
Miami FL 33126
(305) 262-1800

HONORABLE ILEANA ROS-LEHTINEN'S TESTIMONY SUPPORTING H.R. 4312 BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

April 1, 1992

Mr. Chairman and distingushed colleagues of the House Subcommittee on Civil and Constitutional Rights, I support HR 4312, the Voting Rights Improvement Act of 1992, introduced by Congressman Jose Serrano on behalf of the Congressional Hispanic Caucus.

This important legislation will continue and improve a section of the Voting Rights Act which requires bilingual assistance in registering and voting. These provisions are scheduled to end in August 1992. This bill will continue this section until 2007, the year the rest of the Voting Rights Act is scheduled to end.

This bill will reauthorize Section 203 of the Voting Rights Act which requires counties with large language minority populations to provide bilingual assistance to voters. This section has ensured that language minority citizens, many of whom have resided in the U.S. for many years, are fully guaranteed the right to cast an independent, informed vote.

If this section is allowed to expire, minority language voters in 68 U.S. counties will have another barrier to overcome in participating in elections. Many of these voters are elderly American citizens who have contributed much to our nation. By failing to continue this provision they would be discouraged from participating in our system.

This bill will also improve the present section by expanding it to include many minority language communities which have previously been uncovered including such large areas as Los Angeles County. This bill would expand the present requirement that a county must provide bilingual assistance to voters if 5 percent of voting age citizens do not speak English well enough to make an informed vote. Under this bill, a county would also be covered if it has more than 10,000 voters who speak English poorly.

In conclusion, I ask that you support this legislation which would help boost participation among many minority voters who in the past have felt left out of our political system. That is why it has received the support of many non-partisan organizations like the League of Women Voters. At a time when fewer Americans are participating in our political system, let us keep going forward not backward in this important area of voting rights.

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND
99 HUDSON STREET NEW YORK NEW YORK 10013
(212) 219-3360 FACSIMILE: (212) 431-4276

TESTIMONY
OF
PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, INC.
ON
HR 4312

April, 1992

The Puerto Rican Legal Defense & Education Fund, Inc. strongly supports HR 4312. The Puerto Rican and Latino communities consider this legislation among the most important being presented this term.

The Puerto Rican Legal Defense & Education Fund, Inc. ("PRLDEF") is a national civil rights organization founded in 1972 to protect the civil rights of Puerto Ricans and other Latinos and to ensure their equal protection under the laws. One of the first cases brought by PRLDEF sought to eliminate barriers to the right of Puerto Ricans to vote. In February 1973, we obtained a Consent Decree from the City of New York that provided trilingual (English, Spanish, and Chinese) ballots in New York City's school board elections.[1] In the next two years we litigated throughout New York, New Jersey and Pennsylvania seeking to protect these same rights.[2] Our work helped to provide the impetus for the inclusion of the bilingual provisions in the 1975 Amendments to the Voting Rights Act.[3]

---

[1] Lopez v. Dinkins, 73 Civ. 695 (S.D.N.Y. February 14, 1973).

The current proposal to extend and strengthen the bilingual provisions of Section 203 is very important to the Puerto Rican and other Latino communities in this country. There are approximately two million Puerto Ricans living in the United States. Some of us have been here for several generations, but a large segment of our community moves back and forth between the United States mainland and the island. The provision of bilingual voting materials and assistance is crucial to the participation of Puerto Ricans in electoral politics. Unlike other Latino populations, Puerto Ricans are citizens at birth. Many of us were raised in Puerto Rico where Spanish is the official language and many of those raised on the mainland grow up speaking Spanish at home.[4] The rights of these citizens to vote and to participate effectively in the electoral process is dependent upon the availability of a bilingual ballot. As was clearly stated by Judge Charles E. Stewart, Jr. in one of our cases:

---

[2] Torres v. Sachs, 381 F.Supp. 309 (S.D.N.Y. 1974) (New York City); Ortiz v. New York State Board of Elections, 74 Civ. 455 (W.D.N.Y. October 11, 1974) (New York State); Marquez v. Falcey, 73 Civ. 1447 (D.N.J. October 9, 1973) (Four New Jersey Counties); and Arroyo v. Tucker, 372 F.Supp. 764 (E.D.Pa. 1974) (Philadelphia, Pa.).

[3] 42 U.S.C. §§ 1973b(f) and 1973aa-1a (Sections 4(f)(4) and 203 added as Public Law 94-73). See, Senate Report No.94-295 at pages 32-35.

[4] For example, according to the 1980 Census, 94% of Latinos in New York report that Spanish is spoken in the home. Compare Tables 63 and 99, General Social and Economic Characteristics, New York, PC80-1-C34.

> In order that the phrase "the right to vote" be more than an empty platitude, a voter must be able effectively to register his or her choice. This involves more than physically being able to pull a lever or marking a ballot. It is simply fundamental that voting instructions and ballots...must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired.[5]

The importance of maintaining and extending the bilingual provisions for another 15 years cannot be denied. If the ideal that separates this country from many others is the strength of our democracy, that democracy is undermined when limited-English-proficient language minority groups are denied the right to vote. Indeed, for these groups there is no right to vote unless the ballot and other election materials are available to them in a language that they can understand and that permits them to effectively cast their ballots.

Not only must these provisions be extended, but they must be strengthened as well. The original bilingual provision in Section 203 covered all jurisdictions where the population was comprised of 5 per cent or more of a language minority group. This benchmark for coverage was drawn from the cases that PRLDEF had brought in 1973 and 1974[6], in places where there were substantial numbers of Puerto Ricans and other Latinos, such as New York City, Union County, New Jersey, Philadelphia,

---

[5] Torres, 381 F.Supp at 312 (footnote omitted).

[6] See, Senate Report 94-295, p.32 n.31. and, see cases cited in footnote 2.

Pennsylvania.

The benchmark effectively covered other places with significant language minority populations. However, as a result of the 1982 amendment to Section 203, coverage was limited to jurisdictions where 5 per cent of the population was limited-English language proficient language minorities. This limited the covered population beyond its intended purpose. The amendment sought to target coverage to localities where there were language minority populations with need for language assistance.[7] However, by tying this targeting provision to the 5 percent criteria, the amendment cut out many areas where there were substantial language minority populations in need of bilingual assistance. For example, in Queens County in New York City, a place where many newly migrated Latinos have settled, there were over 43,000 Latinos in 1980 who were limited-language-proficient. Yet this county was not covered under the amended Section 203 because these 43,000 limited-English-proficient Latinos were less than 5% of the population. The targeting provision caused the bilingual provisions of the Voting Rights Act to miss its target, and left uncovered substantial groups of voters who needed language assistance.

H.R. 4312 responds to this glaring problem by requiring bilingual assistance where there are 10,000 limited-English-proficient members of a language minority group. This is a more appropriate targeting device which provides coverage for jurisdictions where there are "significant" populations in need.[8] The 10,000 population benchmark will permit many more language minority group members to effectively participate in the process who were not able to under the old scheme.

---

[7] The amendment was introduced by Senator Nickles, thusly: "Mr. President, the amendment I offer would more accurately target bilingual assistance to those who are truly in need of such assistance." Cong. Rec. S7104 June 18, 1982. The amendment was proposed on the floor of the Senate and accepted without debate. *Id*.

With respect to the costs of Section 203, in our work throughout the Northeast on these issues, we have yet to encounter a jurisdiction that has had difficulty financially fulfilling the bilingual mandate. In every instance, election materials have been presented in a bilingual format without significant additional costs for printing or for paper. Bilingual assistance has also been provided by the regularly appointed election day personnel who are bilingual; few if any additional personnel have had to be hired or appointed. The 1986 GAO Report is consistent with our experience.[9]

While PRLDEF has been successful in litigating these issues, litigation is not a good substitute for a self-enforcing provision of the Voting Rights Act requiring bilingual elections. Jurisdictions have and will become less diligent in providing these bilingual services unless there is a strong and clear mandate from Congress. The Puerto Rican and Latino communities' ability to encourage registration and voting is tied to the bilingual ballot. There is a great reluctance for first time voters to enter into an intimidating room filled with curtained voting machines, police officers and "official looking" people. It is almost an insurmountable barrier to one whose dominant language is Spanish. Only the bilingual signs and the bilingual interpreters lessen the inherent intimidation of the voting booth. It has been the experience of PRLDEF that bilingual materials and assistance do make a significant difference in Latino participation in voting.

---

[8] The Senate Report described this provision as follows:

> In those areas of the country with significant populations of language minorities who experience a high rate of illiteracy, the provisions of S. 1279 would also impose...a bilingual elections mandate.

Id. at 9.

[9] Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election, GAO Report GGD-86-134BR, September, 1986, see pages 14-22.

CONCLUSION

We close with a simple plea. We ask each of you to think about your own feelings and those of your families if you moved to Puerto Rico. As many of you know, politics there is very passionate matter. It's not uncommon for family members to stop talking with each other over political questions. Because of the English language press and television in Puerto Rico, you would have an opportunity to understand the candidates and the issues. But would you vote? Would you be willing to test your limited Spanish language skills in seeking to find out how to register? Would you wander into the local school on election day? Would you be deterred if you were asked in Spanish to produce some document that attested to your residency? Most Puerto Rican voters face the same barriers when they move here. It is the bilingual election requirements of the Voting Rights Act that make voting and participation in the electoral process a reality for many Puerto Ricans and other Latinos. We urge you to keep that promise of democracy alive by extending and strengthening Section 203 of the Voting Rights Act.

Submitted by:

Rubén Franco

Rubén Franco
President and General Counsel

**Leadership Conference
on Civil Rights**

2027 Massachusetts Ave., N.W.
Washington, D.C. 20036
202 667-1780

FOUNDERS
Arnold Aronson
A. Philip Randolph*
Roy Wilkins*

OFFICERS
CHAIRPERSON
Benjamin L. Hooks
VICE CHAIRPERSONS
Judith L. Lichtman
Antonia Hernandez
SECRETARY
Dorothy Height
TREASURER
Gerald W. McEntee
LEGISLATIVE CHAIRPERSON
Jane O'Grady
COUNSEL
Joseph L. Rauh, Jr.
HONORARY CHAIRPERSONS
Marvin Caplan
Clarence M. Mitchell, Jr.*

EXECUTIVE COMMITTEE
Owen Bieber
International Union of United Automobile Workers
Kenyon C. Burke
National Council of Churches
Eugene Glover
National Council of Senior Citizens
Jerome Ernst
National Catholic Conference for Interracial Justice
Keith Geiger
National Education Association
Morton Halperin
American Civil Liberties Union
Paul M. Igasaki
Japanese Americans Citizens League
John E. Jacob
National Urban League
Elaine Jones
NAACP Legal Defense & Education Fund, Inc.
Leon Lynch
United Steelworkers of America
Sharon Rodine
National Women's Political Caucus
Sue Lederman
League of Women Voters of the U.S.
Melanne Verveer
People For The American Way
David Saperstein
Union of American Hebrew Congregations
Molly Yard
National Organization for Women
Patrisha Wright
Disability Rights Education and Defense Fund
Kenneth Young
AFL-CIO
Raul Yzaguirre
National Council of La Raza
COMPLIANCE/ENFORCEMENT COMMITTEE
William Taylor, *Chairperson*

STAFF
EXECUTIVE DIRECTOR
Ralph G. Neas
ADMINISTRATIVE ASSISTANT
Lisa M. Haywood
POLICY/RESEARCH ASSOCIATE
Karen McGill Arrington

(*Deceased)

Statement of the Leadership Conference on Civil Rights in Support of Reauthorization and Improvement of the Language Assistance Provision of the Voting Rights Act

April 24, 1992

The Leadership Conference on Civil Rights, a coalition of 185 national organizations representing minorities, women, persons with disabilities, labor, older Americans and the major religious groups, supports legislation to reauthorize and improve Section 203, the Voting Rights Act's language assistance provision. In reauthorizing Section 203, Congress should adopt both an adjusted coverage standard for Native Americans to target more accurately the Native Americans in need of language assistance in voting and a numerical threshold of 10,000 to supplement the existing coverage formula.

LCCR applauds the leadership of Representative Jose Serrano in introducing the "Voting Rights

"Equality In a Free, Plural, Democratic Society"

Improvement Act of 1992" (H.R. 4312), which reauthorizes Section 203 until 2007. H.R. 4312 includes a provision to amend the coverage formula for limited English proficient (LEP) Native American voters.

The Voting Rights Act (VRA) has been one of the most effective civil rights laws in our nation's history. Since its enactment in 1965, millions of Americans who had previously been prevented from participating in the political process have gained access to the American electoral system. Section 203, enacted in 1975, has proven to be one of the Act's most effective provisions, offering the language minority population an opportunity to exercise the most fundamental right of citizenship.

The right to vote means more than the mechanics of marking a ballot or pulling a lever. A non-English speaking individual cannot cast an informed vote without demonstrating an ability to comprehend the registration process, election forms, and the ballot itself. Without such an understanding the right to vote is no more than an empty platitude. English-only elections exclude citizens by conditioning the vote on the ability to read, write, and understand English.

Congress passed the bilingual provisions of the VRA after concluding that English-only elections effectively deny the right to vote to a substantial segment of the nation's language minority population. It found that this result is directly attributable to the unequal educational opportunities, the high incidence of limited English proficiency, and the low income levels suffered by the language minorities of this country. Current Census Bureau information demonstrates that conditions have not changed significantly since 1975. Indeed, census data indicate that the nation's language minority population continues to grow in number, continues to retain a high incidence of limited English proficiency, and continues to be hampered by low educational achievement levels.

The 1990 Latino National Political Survey ("Survey") provides the most current language ability information about Latinos in the United States. The Survey supports the census findings and sheds light on the issue of language ability which is central to this reauthorization process. The Survey results provide detailed information on the language ability and basic socioeconomic factors relating to the United States Latino community. The Survey reveals that a substantial percentage of Latinos do not speak or understand English adequately enough to participate in the electoral process.

Further support for the Census Bureau's findings can be found in a recent National Council of La Raza report, State of Hispanic America 1991: An Overview. The report indicates that by some measures of literacy about 56% of the national Latino population can be considered to be "functionally illiterate." It also points out that by more traditional measures of literacy (usually regarded as completion of the fifth grade), about 12.5% of all Latinos are for most practical purposes completely illiterate.

The need for language assistance in voting remains significant. Section 203 is the only language assistance provision of the Voting Rights Act with a coverage formula adjusted to reflect changing demographic characteristics, such as shifts in major LEP voting age populations and high illiteracy rates.

For the past seventeen years, Section 203 has made the political process more accessible to many of the nation's language minority citizens. Section 203 has contributed to the rise in voter registration and participation rates in language minority communities. From 1976 to 1988, the number of Hispanics registered to vote in the Southwest (Arizona, California, Colorado, New Mexico, and Texas) doubled from 1,512,300 to 3,003,400. In addition, in that same period, the number of voting Hispanic Americans increased from 1,016,000 to 1,634,350.

The number of elected officials of language minority backgrounds also continues to grow. According to the National Association of Latino Elected Officials the number of Latino elected officials more than doubled to 2,793 between 1973 and 1984 in six states with large Hispanic populations. These factors indicate that bilingual voting assistance at the polls has helped to break down barriers to full participation in the electoral process. Hispanic American, Asian American, Native American, and Alaskan Native American citizens depend on bilingual voting assistance to facilitate political participation.

Providing language assistance in voting has proven to be cost effective. A 1986 General Accounting Office (GAO) report found that in 83 responding jurisdictions, providing written assistance in voting comprised an average of only 7.6% of total election expenditures. Oral assistance has been even less costly. In fact, in the states surveyed by the GAO, 18 states providing oral assistance incurred no additional costs. The same GAO study discovered that for 79% of responding jurisdictions, providing oral bilingual voting assistance incurred no additional expense.

With respect to the Native American population, the Leadership Conference believes that the coverage formula to reach LEP Native American voters should be supplemented. The goal of Section 203 is largely unmet with regard to Native Americans because limitations of the coverage formula make it impossible to reach significant concentrations of Native Americans in need of language assistance in voting. Over 80% of the counties previously providing Native American language assistance under Section 203 were eliminated after the 1982 reauthorization.

Most speakers of Native American languages live on reservations or other federally designated lands. Section 203 defines "political subdivision" as a county or parish only, but these terms do not adequately address the reservation situation of much of the LEP Native American voting population. The boundaries of reservations predate many counties and states, and many reservations, where most of the LEP Native American voter population resides, bridge two or more counties and sometimes even cross state boundaries. The operative standard of comparison for Native American coverage is thus unduly restrictive. The reservation or its equivalent should be the standard of comparison by which to determine coverage for Native Americans. H.R. 4312 appropriately provides for an Indian reservation to be used as an alternative standard in determining whether a LEP Native American population qualifies for voter assistance.

As the law now stands, a Native American language voting population, like all language minorities, must equal or exceed 5% of the general voting population of the county or parish. Under this formula, citizens of a Native Americans language group rarely make up 5% of any one of those voting districts, thus denying those citizens the language assistance they need in order to participate in the electoral process. Currently, there are situations in which voting district boundaries cause some LEP Native American voters on a reservation to qualify for Section 203 assistance, while others on the same reservation fail to receive language assistance because they fall into another voting district and do not reach the 5% trigger in that district.

For example, the Tohono O'odam Tribe of Arizona, the fifth largest tribe in the United States, receives no language assistance under Section 203, even though more than 80% of its members spoke the O'odam language at home in 1980. While the Tohono O'odam Reservation includes three counties, the majority of the reservation is in Pima County. Currently, the LEP voting population of the Tohono O'odam Tribe in Pima County alone must be compared to all voting age citizens in Pima County. Two-thirds of that county's population lives off the reservation in Tucson, a major metropolitan area. The large non-Native American population of Tucson overwhelms the LEP Native American population of the county. If, however, the entire Tohono O'odam Reservation were the basis of calculation, the LEP voting population would probably be covered.

H.R. 4312 corrects this inequity by requiring voting assistance if 5% of the voting age population on a Native American reservation are members of a single language minority.

At present, Section 203 prohibits English-only elections and requires language assistance in those jurisdictions in which the director of the Census determines that:

> (i) more than 5% of the voting age citizens are [a] members of a single language minority and [b] do not speak or understand English adequately enough to participate in the electoral process; and (ii) the illiteracy rate of this group is higher than the national illiteracy rate.

The 5% trigger has engendered some anomalies that deserve swift Congressional remedy. Under current law, some counties whose general and LEP voting age populations are both numerically small are covered by Section 203, while several major metropolitan areas with very large LEP populations are not covered because the general voting population is so large. Los Angeles County, CA; Cook County, IL; Queens County, NY; Philadelphia, PA; and Essex County, NJ, have an estimated total of at least 500,000 LEP Hispanic voters, yet all of these counties fail to meet the 5% standard. Similarly, large Asian American communities in California (Los Angeles, San Francisco, and Santa Clara counties) and three New York City counties (Kings, Queens, and New York) are currently not subject to Section 203, but would probably benefit from language assistance in voting.

LCCR supports the provision in H.R. 4312 that would fill such gaps in Section 203 coverage by adding a numerical threshold as an alternative to the 5% standard for coverage. With a numerical "benchmark" of 10,000, for example, a county with over 10,000 LEP voters of a particular language minority would have to provide language assistance, even if that population did not equal 5% of the county's voting population.

The Leadership Conference on Civil Rights has always supported measures that make it easier for all eligible Americans to exercise their basic right to vote. Our diverse nation benefits greatly from the contributions of millions of language minority citizens. Simple justice demands that we not deprive these citizens their rightful voice in our democracy simply because that voice speaks a language other than English. Section 203 has proven to be a useful vehicle to involve language minority citizens in the political process. It has been and remains a needed legal and practical element in realizing the intent of the Voting Rights Act.

Section 203 mandates bilingual registration and voting assistance for communities with significant concentrations of language minority citizens whose constitutional right to vote would otherwise be significantly impaired or abridged. It has successfully and efficiently facilitated voter participation. Unless Section 203 is reauthorized by August 6, 1992, sixty-eight counties (three of which provide assistance in two languages other than English) will no longer be required to provide language assistance to LEP citizens who are eligible to vote. With an improved coverage formula for the Native American community and a numerical threshold of 10,000 in addition to the 5% trigger, as contained in the Voting Rights Improvement Act of 1992 (H.R. 4312), Section 203 should be extended until the date in 2007 when all other provisions of the Voting Rights Act expire.

By adding a benchmark of 10,000 and adjusting the coverage formula for Native American voters, Congress will improve Section 203 to target more fairly those language minority populations in need of language assistance in voting. On behalf of its 185 member organizations, the Leadership Conference on Civil Rights urges swift reauthorization of Section 203 with such improvements.

COMMONWEALTH OF PUERTO RICO
Department of Puerto Rican Community Affairs
IN THE UNITED STATES

STATEMENT SUBMITTED TO THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES SUB-COMMITTEE ON CONSTITUTIONAL AND CIVIL RIGHTS

BY: DEPARTMENT OF PUERTO RICAN COMMUNITY AFFAIRS IN THE UNITED STATES

NYDIA VELAZQUEZ
Secretary

The bilingual election requirements of the Voting Rights Act, 42 U.S.C. 1973aa-1a, commonly referred to as Section 203, mandate that the states provide "registration or voting notices, forms, instructions, assistance or other materials or information relating to the electoral process, including ballots" in the language of the applicable minority group as well as English if that minority group, as determined by the Census, is more than 5% of the citizens of voting age of the state or political subdivision thereof, and that the illiteracy rate, i.e., in ability to speak English, of such persons as a group is higher than the national illiteracy rate. Where these requirements have become applicable to the Puerto Rican population residing within a state such as in New York the effect has been to bolster the participation of that community in the electoral process and to preserve the right to vote of those language minority group citizens.

304 PARK AVENUE SOUTH • NEW YORK, NY 10010 • TEL. (212) 260-3000

Today, with the continuing rapid growth of the Puerto Rican population in states such as Massachusetts, Connecticut, Pennsylvania, Illinois, Florida, Texas, Michigan, Virginia, etc., the importance of the bilingual provisions is underscored. The Puerto Rican population in the United States, who are United States citizens by birthright whether born in Puerto Rico (where Spanish is the official language) or the mainland, continue to be predominantly Spanish speaking either out of necessity or by preference. Recently released preliminary results from the Latino National Political Survey[1] indicate that nationwide only 34% of the Puerto Rican population consider their language ability to be better in English than in Spanish.

In 1988, the government of Puerto Rico conducted a survey entitled "Puerto Rican Voter Registration in New York City". That survey concluded that "language barriers continue to be an important obstacle affecting more than a quarter of those not registered". While in the survey only 6% of the non-registered individuals listed language problems as their main reason for not registering, when asked in another question: how important a reason language was in their not registering, 27% of these same individuals indicated that it was "somewhat to most important". These results were all the more interesting given that 77% of those who were not registered stated that Spanish was their first language, and 87% of them chose to have their interviews conducted in Spanish.[2] It should be noted that language barriers are, no doubt, even more of a problem for other, more recently arrived Latinos, such as Dominicans and Colombians.

---

[1] Identity, Policy Preferences and Political Behavior, P-eliminary Results from the Latino National Political Survey, R.O. de la Garza, Harvard University and A. Falcon, Institute for Puerto Rican Policy (1992).

Clearly, the Puerto Rican population in the United States is a language minority which continues to perceive and confront English as a barrier to its full and effective participation in the electoral process. Failure to reauthorize the bilingual election requirements of the Voting Rights Act would only serve to alienate voting age U.S. citizens of Puerto Rican heritage living in the United States from the electoral process with all of the ensuing negative consequences. Political gains made through the ballot box since 1975 by the Puerto Rican community in places like New York are attributable, directly or indirectly, to the access provided members of that community in Spanish to information, forms, interpreters and ballots as necessitated by the Section 203 requirements.

This office respectfully urges that the Judiciary Committee and the full Senate vote not only to reauthorize the bilingual provisions of the Voting Rights Act, but also that the reauthorization include the amendments proffered by Congressman

---

[2] Puerto Rican Voter Registration in New York City: January, 1988, Migration Division, Department of Labor and Human Resources, Government of Puerto Rico.

Jose Serrano (New York - 18th Congressional District), H.R. 4312, which would expand the coverage of the Section and reauthorize it for 15 years. The beneficiary of such a reauthorization would be democracy in the United States.

Thank you.

THE LEAGUE
OF WOMEN VOTERS
OF THE UNITED STATES

STATEMENT TO THE HOUSE JUDICIARY SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
ON
VOTING RIGHTS ACT LANGUAGE ASSISTANCE AMENDMENTS
BY
SUSAN S. LEDERMAN, PRESIDENT
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
APRIL 1, 1992

The League of Women Voters of the United States is a nonpartisan citizen organization with members in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. One of the League's primary missions is to promote citizen participation in government and particularly to protect the right to vote. Today, League members remain committed to the belief that voting is a right, not a privilege.

Since 1920, the League has worked for passage of laws to reform the nation's voting system. In 1975, the League lobbied extensively to amend the Voting Rights Act and to expand its coverage to language minorities. In 1982, the League was a leader in the struggle to strengthen the Voting Rights Act and to extend its major provisions for another 25 years. Today, the League chairs a coalition of more than twenty civil rights, disability rights and civic organizations that advocates passage of national legislation to reform voter registration procedures.

Even though the League's activities on voting rights and voter registration have been numerous and widespread, there is still more work to be done. America's voting rate in federal elections has fallen to the lowest of any of the world's major democracies. We know that citizens will vote if they are registered. In 1988, over three-quarters of those who were registered, voted. Close to seventy million American citizens were unable to vote because they were not registered.

Inconvenient registration sites, insufficient outreach to minority communities and uncooperative registration officials discourage voter registration, especially among the minority population, which is more likely to be poor, transient and undereducated than white Americans. Indifference and sometimes even outright hostility toward minority registrants and minority political participation is prevalent. Patronizing treatment and slow service are familiar tactics for preventing minority citizens from registering and voting.

The League strongly supports the reauthorization of Section 203 of the Voting Rights Act of 1965. By mandating language assistance for communities with significant concentrations of language minority citizens, Section 203 of the Voting Rights Act enables language

President
Susan S. Lederman
New Providence, New Jersey

Vice President
Virginia C. DeSchrone
Arlington, Virginia

Jean Askham
Fullerton, California

Secretary-Treasurer
Diana Winterhalter
Columbus, Ohio

Directors
Mary Ellen Barry
Naperville, Illinois

Becky Cain
St. Albans, West Virginia

Jane S. Gerber
Weston, Connecticut

Adrienne Taylor Latham
Nashville, Tennessee

Peggy Lucas
Minneapolis, Minnesota

Barbara McCormick
Houston, Texas

Linda G. Moscarella
El Prado, New Mexico

Nancy Pearson
Tacoma, Washington

Robin Seaborn
St. Petersburg, Florida

Susan Shaer
Andover, Massachusetts

Kathleen Wesenberg
Atherton, California

Executive Director
Gracia M. Hillman

1730 M STREET N.W. WASHINGTON, D.C. 20036
202/429-1965 FAX 202/429-0854

minority citizens to exercise their fundamental right to vote. Language assistance allows non-English speaking citizens to participate in the democratic process.

We believe that the remarkable success of Section 203 in increasing minority registration and removing many of the barriers to minority participation in the political process is the best argument for its reauthorization. The Hispanic community has witnessed a steady increase in voter registration and turnout since the 1970s, which continued throughout the 1980s. Hispanic voter registration and participation nationwide increased 43.7 percent and 30.5 percent respectively from 1980 to 1990. In the Southwest, Hispanic voter registration doubled from 1976 to 1988 -- from 1,512,300 to 3,003,400. Only 1,016,000 Hispanics in the Southwest voted in 1976, while 1,634,350 voted in 1988.

Though Section 203 has enabled many language minority citizens to register and vote, there is still need for continued language assistance for communities with significant concentrations of language minority citizens. These communities have grown rapidly during the past decade. The Asian/Pacific Islander population increased by more than 100 percent between 1980 and 1990. The Hispanic population increased 53 percent, and the Native American population increased by 37 percent in this time period. In order to guarantee the growing numbers of limited English proficient citizens their fundamental right to vote, Section 203 must be reauthorized.

In addition, there are several technical flaws in Section 203 that need to be remedied. Under current law, a small county with a population of three or four thousand may be covered under Section 203, but Los Angeles County is not. More than 250,000 people with limited English proficiency live in Los Angeles County, but this number does not reach the five percent of voting age population necessary for Section 203 coverage. Many limited English proficient citizens are concentrated in major metropolitan areas, such as Philadelphia, Queens, Chicago and Los Angeles and are ineligible for assistance because their communities do not trigger the current five percent population standard for coverage. As a result, hundreds of thousands of eligible citizens in large metropolitan areas are denied coverage because of an unintended flaw in the provision's trigger.

Another technical flaw undermining Section 203 affects many Native Americans. In part, the shortfall in coverage for Native Americans can be traced to the jurisdiction used for determining coverage. While the Native American voting population resides primarily within reservations, Section 203 measures language minority populations on a county basis, which results in a dilution of their population for the purpose of determining coverage. Reservations are usually split among several counties, making it difficult for citizens living on the reservations to gain language assistance.

The League of Women Voters urges you to address these technical flaws and to reauthorize Section 203 for fifteen years.

In 1975, Congress found that certain American citizens, although born and reared in this country, could not effectively exercise their right to vote because they were not fluent in English. Recognizing that these citizens must not be excluded from the electoral process, Congress wrote: "Discrimination in voting is a wrong which no American, in his heart, can justify. The right to vote is one which no American, true to our principles, can deny." The League of Women Voters believes that whether they speak Spanish, Lakota, Chinese, or English, all American citizens must be guaranteed their right to vote.

ORGANIZATION OF CHINESE AMERICANS®, INC.
EMBRACING THE HOPES AND ASPIRATIONS OF CHINESE IN THE UNITED STATES
2025 EYE STREET, N.W. • SUITE 926 • WASHINGTON, D.C. 20006 • (202) 223-5500
美華協會

OCA FULLY SUPPORTS THE VOTING RIGHTS IMPROVEMENT ACT OF 1992 - H.R. 4312

The Organization of Chinese Americans, Inc. (OCA), fully supports H.R. 4312, the Voting Rights Improvement Act of 1992 introduced by Congressman Jose Serrano (D-NY). The Voting Rights Improvement Act of 1992 reauthorizes Section 203 of the Voting Rights Act which provides bilingual assistance as well as improves the criteria for political subdivisions to qualify for Section 203 coverage. For the Asian American community the bill further opens up the opportunities to become full participants of the American political/electoral process.

Currently there are no counties on the Continental U.S. which are covered under Section 203 for the Asian languages because there is no single Asian language minority group in a county that can attain all three requirements necessary for coverage. Only three counties in Hawaii fall under Section 203 coverage for Asian languages. Each individual Asian language group must qualify on its own. For example, not even San Francisco qualifies for bilingual assistance because the Chinese American citizens of voting age population in San Francisco are not 5% of the total population with an illiteracy rate higher than the national illiteracy rate, and are limited English proficient. Yet, San Francisco's 1990 Chinese population is over 120,000 persons.

OCA Executive Director Daphne Kwok stated, "Even though the Asian American population is the fastest growing population percentage wise, we will still never be able to benefit from Section 203 because of these stringent requirements. The importance of Congressman Serrano's bill is that it provides a key element necessary for the Asian American community to benefit from the bilingual provisions of the Voting Rights Act - the 10,000 numerical benchmark. In addition, with the reauthorization of Section 203 we are laying the foundation for the future wave of Asian American voters to become full participants in America's political system. OCA commends Congressman Serrano and all supporters of the bill for their commitment to equal access and participation in the electoral process."

The numerical benchmark being introduced as an improvement will be another indicator for Section 203 coverage. Under a 10,000 population benchmark figure for each individual Asian language group, it is estimated that San Francisco, Los Angeles, and possibly Queens, New York may qualify for Chinese language coverage.

OCA commends Chairman Don Edwards (D-CA) for holding today's hearings to provide advocates the opportunity to present the compelling need and benefits for not only the reauthorization of Section 203 of the Voting Rights Act but also for further refinements of the law.

ORGANIZATION OF CHINESE AMERICANS'. INC
EMBRACING THE HOPES AND ASPIRATIONS OF CHINESE IN THE UNITED STATES
2025 EYE STREET, N.W. • SUITE 926 • WASHINGTON, D.C. 20006 • (202) 223-5500
美華協會

STATEMENT OF THE

ORGANIZATION OF CHINESE AMERICANS

VOTING RIGHTS IMPROVEMENT ACT OF 1992

H.R. 4312

House Committee on the Judiciary
Subcommittee on Civil and Constitutional Rights
April 1, 1992

The Organization of Chinese Americans, Inc. (OCA) supports H.R. 4312 the Voting Rights Improvement Act of 1992 introduced by Congressman Jose Serrano (D-NY). H.R. 4312 reauthorizes Section 203 of the Voting Rights Act which provides bilingual assistance for elections as well as includes an alternative coverage standard for Native Americans and a numerical benchmark. The reauthorization of the language assistance provision of the Voting Rights Act is of extreme importance to U.S. citizens of Asian language backgrounds especially for the next 15 years.

The Asian American community in the United States is relatively young in terms of length of stay in the U.S. compared to other minority language groups e.g. Hispanic and Native Americans. It is only since the lifting of the restrictive anti-Asian immigration laws in 1965 that Asians have been able to immigrate to the U.S. under the same terms as other immigrants from around the world. Even though some Asian Americans have been in the United States for over 100 years, they have only gained citizenship rights within the last 50 years. Chinese won the rights to be naturalized in 1943, Filipinos in 1946 and Japanese and Asian Indians not until 1953. Because of the relatively recent immigration patterns of Asians in the 1960's through 1990's and the recent laws allowing Asians to naturalize, Asian American political participation is just beginning.

The decade of the 1980's has seen the greatest increase in the Asian American population in the United States. According to the 1990 census, there are over 2.7 million Asian Pacific Islanders in the U.S. which represents a 107% increase over the past decade. The census data also shows that 70% of the Asian American population is foreign born. Therefore, English-as-a-second-language is a very high percentage in the Asian community.

According to the 1990 census, the five states with the largest Asian American populations are:

State	Total API Pop.	Chinese	Filipino	Japanese	Korean
California	2,845,689	704,850	731,685	312,989	259,941
New York	693,760	284,144	62,259	35,281	95,648
Hawaii	685,236	68,804	168,682	247,486	24,454
Texas	319,459	63,232	34,350	14,795	31,775
Illinois	285,311	49,936	64,225	21,831	41,506

Section 203 of the Voting Rights Act was added to the Voting Rights Act in 1975 to address the exclusion of limited English proficient (LEP) voting age citizens from participating effectively in the electoral process. Section 203 is aimed to protect every U.S. citizen's constitutional rights to the Fourteenth and Fifteenth amendments which guarantee all eligible citizens the rights to vote.

Although Section 203 has had a very limited impact in assisting the Asian language community, it is still a vital tool for future effective Asian American political participation. Our community will be growing into the application of Section 203 as our numbers attain the prescribed conditions for coverage.

Currently, Section 203 covers only three Asian language jurisdictions which are all in Hawaii. There are no jurisdictions on the Continental mainland of the U.S. which qualify for Section 203 assistance.

As Asian Americans are the fastest growing minority group in the country, we face a very unique situation when qualifying for Section 203. Section 203 impacts a jurisdiction when a "single" language minority attains the following three criteria:

1. More than 5% of the jurisdiction's voting age citizens are of a single language minority.
2. This group does not speak or understand English well enough to participate in the electoral process; and
3. The illiteracy rate of this group is higher than the national illiteracy rate.

The four Asian languages that are currently covered under Section 203 - Chinese, Japanese, Korean and Tagalog - are each distinct and separate languages. Thus, the Asian language community cannot be judged as an aggregate community; each language group must rise independently to trigger the criteria.

We will be unable to fully determine which counties are subject to Section 203 coverage until the 1990 census data tabulations needed to determine a locale's eligibility are available. In the meantime from the 1990 untabulated data already released, the following list of counties with large concentrations of Asian Americans not covered under Section 203 can be used to illustrate the difficulty of attaining coverage:

County	Chinese	Filipino	Japanese	Korean
San Francisco	127,140			
Los Angeles	245,033	219,653	129,736	
Kings, NY	68,191			
New York, NY	71,723			
Queens, NY	85,885			49,083

OCA believes that for Section 203 to truly afford the U.S. Asian language community the fundamental right to vote and to be active participants of the American political process, it is necessary to add a fourth requirement for qualification of Section 203 coverage - a numerical population benchmark. OCA believes a 10,000 person numerical threshold of a single language minority of voting age citizens that are limited English proficient as introduced in H.R. 4312 would be a needed refinement to Section 203 of the Voting Rights Act.

With the proposed benchmark, the above listed major metropolitan areas with large Asian populations may potentially qualify for bilingual language assistance. For example, San Francisco, with a 30% Chinese American population, would most likely qualify. Without the numerical benchmark, the Asian American community on the U.S. mainland will remain a major block of disenfranchised voters. OCA believes that 10,000 is a sizeable and reasonable number as there are numerous counties with populations of less that 10,000 and about 15 counties that receive Section 203 coverage which have a population of 10,000 or less.

The benchmark concept would aide not only the Asian American community but also the Hispanic community which is not able to receive coverage in the same metropolitan areas. The proposed refinement would not replace the 5% of the minority language population requirement but would be in addition to the percentage requirement.

With a 10,000 benchmark, a very rough estimate of potential counties that would qualify for Section 203 Asian language coverage would be:

San Francisco - Chinese
Los Angeles - Chinese
Filipino
Korean
New York - Chinese
Queens, NY - Chinese

To the notion that bilingual or multilingual ballots are costly and would drain the public coffers there are two responses to dispel the notion. First, a 1986 General Accounting Report "Bilingual Voting Assistance: Costs of and Use During the November 1984 General Elections" determined that written bilingual costs average 7.6% of the overall election costs. Oral assistance may be even less since jurisdictions with heavy concentrations of language minority constituents may hire bilingual poll workers anyway. Second, and most importantly, the right to vote should not be dependent upon the issue of cost as voting is a fundamental right. We should never judge our Constitutional rights policies on the issue of cost.

As the Congress examines the reauthorization of Section 203 of the Voting Rights Act, OCA stresses the importance of bilingual assistance for the future waves of U.S. citizens of Asian heritage to be able to exercise their fundamental rights of being active participants in the U.S. electoral process. With a numerical benchmark refinement of 10,000 to H.R. 4312, Asian Americans presently qualified to vote but constrained to participate due to language difficulties and living in jurisdictions unable to reach the requirements necessary for Section 203 coverage will finally become an interwoven element of the U.S. society.

TESTIMONY OF

NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

CONGRESSMAN DON EDWARDS, CHAIR

PREPARED BY

Asian American Legal Defense and Education Fund
Asian Law Caucus, Inc.
Asians Pacific American Legal Center of Southern California

April 27, 1992

Washington, D.C.

CONTACT:

MARGARET FUNG
ELIZABETH OUYANG
Asian American Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, NY 10013
(212) 966-5932

KATHRYN K. IMAHARA
Asian Pacific American Legal Center of Southern California
1010 S. Flower St., Suite 302
Los Angeles, CA 90015
(213) 748-2022

WILLIAM R. TAMAYO
DOREENA WONG
Asian Law Caucus, Inc.
468 Bush Street, 3rd Floor
San Francisco, CA 94108
(415) 391-1655

The National Asian Pacific American Legal Consortium (Consortium) is the first Pan Asian Legal organization to address issues of national legal importance for the Asian and Pacific Islander communities in the United States. Established in 1991 by the Asian American Legal Defense and Education Fund in New York, the Asian Law Caucus in San Francisco, and the Asian Pacific American Legal Center of Southern California in Los Angeles, the Consortium challenges issues of Anti-Asian violence, Voting Rights, Language Rights and Immigration.

People of color have historically been the victims of racial discrimination and Asians and Pacific Islanders (Asians) have not been exempted from this experience. From segregated schools and racially restrictive real estate covenants to the forced relocation and incarceration of Japanese Americans during World War II, Asians have faced a variety of laws and practices designed to contain the so-called "yellow peril" feared by whites.[1]

An outgrowth of this general atmosphere of racism was the exclusion of Asians from the political process. The attitude that Asians were somehow "unfit" to participate in the political process was made evident by laws prohibiting Asians from testifying for or against whites. In People v. Hall, 4 Cal. 339 (1894), the California Supreme Court held that the Chinese are "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point" and to allow them to testify would "admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls." Id. at 405. The exclusion of Asians was furthered through the use of literacy tests and other voter screening devices and through restrictions placed on the ability of Asians to become citizens.

---

[1] See generally S. Rep. No.295, 94th Cong. 1st Sess., reprinted in 1975 U.S. Code Cong. and Admin. News 774, 794-795. The Judiciary Committee found that high illiteracy rates among people of color was "not the result of choice or mere happenstance" but instead was "the product of the failure of state and local officials to afford equal educational opportunities to members of language minority groups." Id. at 794. "For example, until 1947, a California statute authorized local school districts to maintain separate schools for children of Asian descent, and if such separate schools were established, the statute prohibited these children from attending any other school. See Guey Heung Lee v. Johnson, 92 Ct. 14, 404 U.S. 1215, 30 L. Ed 19 (1971). The effects of that past discrimination against Asian Americans in education continues into the present." Id. In a footnote, the Committee states that "[d]iscrimination against Asian Americans is a well known and sordid part of our history." Id at 795, n. 21.

To address the problem of widespread voting rights discrimination against people of color, Congress passed the Voting Rights Act of 1965. The Voting Rights Act, together with its amendments has been one of the most important pieces of legislation ever passed because it recognizes language minority groups and upholds their right to participate fully in the political process.

The Consortium supports fully the reauthorization of the language assistance provisions of the Voting Rights Act. New citizens from different Asian and Pacific Islander countries, especially those from communist countries, cherish the right to vote. Because this right was denied them the majority of their lives, they feel privileged to exercise it. However, the level of English necessary to become a citizen of the United States is far below that which is needed to read a ballot. Everyone of us who votes knows that the level of English proficiency necessary to understand voting materials and to vote is very high.

There are those who argue that unless a person can read a ballot, they should not be allowed to vote. This rhetoric was used throughout the South as a way to disenfranchise African Americans. The U.S. Supreme Court recognized that these types of literacy tests denied African Americans access to the polls and declared them unconstitutional. The importance of access has not been diminished in 1992. The Language Assistance Provisions of the Voting Rights Act serve as a guarantee that people will continue to have access to polls and multilingual information.

The Consortium is also advocating for the expansion of Section 203. As it is currently written, no Asian language community would qualify for ballots or voter materials in their native language. We proposed that a benchmark figure of 10,000 be used to supplement the current 5% requirement. A benchmark figure of 10,000 language minorities in a county who need bilingual assistance would provide coverage for substantial populations of Asians in large counties such as Los Angeles and New York. Under the current Section 203 requirements, no language minority group in the county of Los Angeles qualifies for bilingual ballots -- even for the Latino community which comprises almost 40% of the county's total population. The difficulties facing the Latinos are increased a hundred fold for the Asians who do not have a shared language.

The 1990 census indicates that the Asian American population in New York City exceeds half a million, with an estimated total voting age population of 378,520. Yet, with the current 5% requirement of 203, no language minority would be covered in any of the five counties in New York City. The numbers of Asian American voters in these counties are larger than in some cities in the United States. Yet, the following language minorities are not currently covered under Section 203.

In New York City (Manhattan) -- a jurisdiction covered under Section 5 of the Voting Rights Act -- there are 71,623 Chinese Americans, concentrated mainly in Lower Manhattan's Chinatown, and 6,183 Korean Americans. In Kings County (Brooklyn) -- also covered under Section 5 of the Voting Rights Act -- the Chinese American population is 68,191 with a growing concentration in the Sunset Park neighborhood. In Queens County, where Asian Americans constitute 11.7% of the population, there are 86,885 Chinese Americans and 49,088 Korean Americans. This is the fastest growing Asian American community in the City, but bilingual assistance is not provided to any Asian language minority voters. In Los Angeles County, the Chinese, Filipino, Japanese, Korean and perhaps the Vietnamese communities would qualify for language assistance if the 10,000 benchmark figure is used.

The communities who would benefit from the benchmark figure have already expressed a desire to have language assistance. In a preliminary study conducted in Los Angeles, 84% of Asian and Pacific Islanders surveyed indicated that they would vote or be more likely to vote if language assistance was provided. In San

Francisco, Chinese bilingual ballots have been available since 1980, only as a result of a lawsuit and consent decree. In a community forum held on January 11, 1992, in San Francisco, almost 200 American citizens of Chinese ancestry articulated their need and right to have bilingual ballots and translated voting materials. In an exit poll conducted in New York in November 1991, out of 500 people asked, 330 people responded YES that they would be more likely to vote if ballots were in their primary language.

At the minimum, the Language Assistance Provisions of the Voting Rights Act should be reauthorized. For the voters who have translated materials, this provision is essential in their quest to be responsible citizens. To comply fully with the spirit of the Voting Rights act, however, the benchmark figure should be used to include many more languages and newer communities and to lift the penalty of living in a large county like Los Angeles or New 2York.

Japanese American Citizens League
1730 Rhode Island Avenue, N.W., Suite 204
Washington, D.C. 20036-3148
Telephone: (202) 223-1240 Fax: 202-296-8082

National Headquarters:
San Francisco, CA

WRITTEN TESTIMONY

REAUTHORIZATION OF SECTION 203

OF THE VOTING RIGHTS ACT OF 1965

(H.R.4312)

HOUSE CIVIL AND CONSTITUTIONAL RIGHTS SUBCOMMITTEE
806 O'NEILL HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515

SUBMITTED BY

THE JAPANESE AMERICAN CITIZENS LEAGUE

The Japanese American Citizens League (JACL) is a national civil and human rights and educational organization concerned with the welfare of Japanese and Asian Americans. It was formed in 1929 and is the largest Asian American civil rights organization, with 113 chapters and 24,000 members nationally. We respectfully submit the following written testimony to the House Subcommittee on Civil and Constitutional Rights in support of H.R. 4312, "The Voting Rights Improvement Act of 1992."

REAUTHORIZATION OF SECTION 203 OF THE VOTING RIGHTS ACT

Section 203, the language assistance provisions, of the Voting Rights Act is scheduled for reauthorization in August 1992. In recognizing that English-only elections denied language minority voters effective participation in the electoral process, Congress amended the Act in 1975 and 1982 to insure that "language assistance is provided to address the vestiges of discrimination against language minority citizens and is an integral part of providing the protections which the Act has sought to extend to minorities."[1]

If Congress fails to reauthorize Section 203, 68 jurisdictions which are currently required to provide language assistance will no longer be required to do so. The only 3 jurisdictions under Section 203 coverage to provide Asian language assistance (Japanese) is included in the cutoff. Although the Asian American population has grown dramatically in the past decade, the current coverage formula for triggering language assistance is such that, despite the significant increase in numbers, no jurisdiction on the mainland United States provides Asian language assistance under Section 203. A simple change in the coverage formula can substantially counteract that exclusion and insure that Asian American voters who need language assistance in order to cast an independent and informed vote will be provided that assistance.

Congress must reauthorize and amend Section 203 to insure and safeguard the fundamental right of all citizens, including language minority citizens, to vote and be active participants in the American political process.

INSTITUTIONAL EXCLUSION OF ASIAN AMERICANS

Although in principle, the right to vote has been regarded as the cornerstone of our nation's democratic process, the reality is that the history of this fundamental right of American citizenship has been one of discrimination and exclusion based on class, gender, language, and race.

---

[1] H.R. REP. NO. 227

This has been especially the case for Americans of Asian descent. Despite the fact that Asians have lived in the United States and contributed greatly to its development as a nation since the 1850's, the right to vote is actually a relatively "new" right for Asian Americans. This was because Asians were legally barred from U.S. citizenship, the basic underlying qualification for the exercise of the franchise. It was not until the 1952 McCarran-Walter Act that Asians were allowed to apply for American citizenship,[2] almost 90 years after Blacks were given the right of U.S. citizenship.

The denial of citizenship to Asians set the groundwork for the racist institutional barriers Asian Americans would face throughout their history in America. Between the late 1800's and 1900's, over 600 pieces of legislation were enacted to limit or exclude Asian Americans from land ownership, intermarriage, immigration, employment, education, housing and other basic forms of participation in American life. February 19th of this year marked the 50th Anniversary of the signing of Executive Order 9066 by President Roosevelt which called for the forced removal of 120,000 Americans of Japanese descent into concentration camps shortly after the start of World War II. The cumulative effect of such institutional racism left Asian Americans economically discriminated, socially ostracized, and politically disenfranchised.

As excluded members of a representational and participatory system of governance, the denial of U.S. citizenship, and hence the denial of the right to vote, effectively prevented Asian Americans from exercising their constitutional, civil, and political rights, while ultimately depriving them of any means of protection against lawlessness and racial discrimination too often inflicted by a hostile and prejudiced majority. The denial of the vote essentially cut off the primary source of access, empowerment, and inclusion of Asian Americans as full participants in American society. For as succinctly noted in the Hastings Constitutional Law Quarterly:

> Voting is the primary means by which [Americans] protect a host of interests germane to the specialty of their lives. It is the means by which they elect those who will best represent their interests in government. The voting franchise also preserves the procedural due process right of persons to participate in the application and creation of laws that are relevant to their individual situations. Voting also preserves the first amendment right to freedom of political

---

[2] The Chinese were allowed the right of citizenship in 1943 because they were considered allies of the United States.

expression.[3]

In recognizing the crucial relationship between the right to vote and the upholding of our nation's basic principles of equal justice and opportunity for all Americans, Congress passed the Voting Rights Act of 1965 to combat insidious voting discrimination instituted primarily against Americans of color. The impact of this Act in empowering historically disenfranchised Black Americans cannot be underestimated. For example, prior to enactment of the Act, only 41% of voting age Blacks in eleven southern states were registered to vote. By the 1968 Presidential elections, that figure had jumped to 62%, an increase of 50%.[4] In 1974, Blacks held only 964 elected offices; by 1980 that number had risen to 2,042.[5]

In 1975, upon finding that large numbers of citizens who spoke languages other than English were excluded from participating in the electoral process, Congress amended the Act to require political subdivisions (usually counties) to provide language assistance if more than 5% of the voting age citizens were members of a language minority[6] and the illiteracy rate of that group was higher than the national illiteracy rate.[7]

Known as Section 203, the empowering effect of these provisions on the disenfranchised language minority groups was equally dramatic. The impact is especially compelling within the Hispanic community which has witnessed a strong and steady increase in voter registration and turnout since 1976. In the Southwestern states of Arizona, California, Colorado, New Mexico, and Texas, registration rates for Hispanics doubled -- from 1,512,300 to 3,003,400 -- between the years of 1976 to 1988. In 1973, Hispanics held 1379 elected offices; by 1991, that number had risen to 4202.

---

[3] Note, "Language Minority Voting Rights and the English Language Amendment," Hastings Const. L.Q. 657, 668 (1987)

[4] K. Thompson, Joint Center for Political Studies, The Voting Rights Act and Black Electoral Participation 10-11 (1982)

[5] "A Citizens Guide to Understanding the Voting Rights Act," U.S. Commission on Civil Rights, October 1984

[6] "language minority" is defined as persons who are Native American, Asian American, Alaskan Native, or Hispanic American.

[7] Section 203(b) was amended in 1982 to limit the 5% language minority criteria to only those language minority citizens "who do not speak or understand English adequately enough to participate in the electoral process", the determination of which is made by the Director of the Census.

Even though Asian Americans are eligible for language assistance as a designated language minority group under Section 203, the enfranchising potential of those provisions have not materialized as significantly for the Asian American community compared to the other minority groups. In fact, as evidenced by the dearth of Asian Americans in elected offices, in political appointments to boards and commissions, an the low voter participation rates, it would seem the empowerment opportunities of Section 203 have yet to be fully utilized by the Asian American community.

With the exception of Hawaii, there are very few Asian American elected officials in the United States. California has two Asian American Congressmen[8], and yet, even though Asian Americans comprise almost 10% of the total state population, Secretary of State March Fong Eu is the only Asian American to hold a State elected office; and no Asian American has been elected to the State Assembly for the past decade. New York City, with more than 400,000 Asian Americans, has never had an Asian American elected to the city council. All in all, Asian Americans constituted only .08% of the half million local elected officials in this country in 1987 -- only one-thirty-sixth of the total Asian American population in the U.S. at that time.[9]

In voter participation, Asian Americans have often had lower voting rates than other population groups. In a survey of California voters, 69% of eligible Asian American voters voted in 1984, compared with non-Hispanic white and Black citizens.[10]

Such political underrepresentation and lack of political power for Asian Americans resulted from a combination of demographic factors (historically small populations, due to racist immigration laws, and large numbers of recent immigrants ineligible to vote), as well as the aforementioned effects from the legacy of racial discrimination and prejudice against Asian Americans.

But the underutilized potential for enfranchisement of Asian Americans under Section 203, in particular, may specifically be attributable to the inability of most Asian language minority groups to meet the Section 203 criteria to trigger language assistance.

---

[8] Rep. Robert Matsui (D-CA-3); Rep. Norman Mineta (D-CA-13)

[9] U.S. Department of Commerce, 1987 Census of Governments, Volume 1, Number 2: Government Organization/Popularly Elected Officials xiii (1990)

[10] "Civil Rights Issues Facing Asian Americans in the 90's", report by the U.S. Commission on Civil Rights, Feb. 1992

Under the current regulations, each language minority group must be 5% or more of the entire county population. First of all, unlike the Hispanic community which speaks only one language, the Asian American community is multi-lingual, thus each Asian language group must meet the 5% criteria; disaggregated into separate language groups, most Asian groups cannot meet that threshold. Secondly, most Asian Americans reside in large urban cities like Los Angeles, New York, and San Francisco, areas with very large total county populations; because the 5% is based on the total county population, no specific Asian language group can be 5% of such a large population base. Ironically, then, the very law that was designed to help remedy the political discrimination faced by language minorities, in effect, ends up perpetuating the invidious pattern of systematic exclusion.

ASIAN AMERICAN LANGUAGE ASSISTANCE UNDER SECTION 203

Under Section 203, jurisdictions are required to provide minority language assistance if:

1) 5% or more of the citizens of voting age are members of a language minority group

2) the illiteracy rate of this group is higher than the national illiteracy rate

3) there is a lack of English language proficiency within the relevant language minority group, the status of which is determined by the Census Bureau.

When the last criterium was added in 1982 by Senator Nickles of Oklahoma, 209 of the 369 jurisdictions which provided language assistance were no longer required to do so. Proportionally, the impact on the Asian language minority groups was equally devastating: two of the five counties (providing assistance in 2 different Asian languages)[11] were dropped from coverage. San Francisco, the only mainland county to provide Asian language assistance, was eliminated from coverage even though Chinese Americans comprised the largest minority language group in that county.

Although, Asian American language groups have been technically eligible for language assistance under Section 203 (for Chinese, Japanese, Filipino, and Korean) since 1975, in reality very few jurisdictions provide Asian language assistance. Currently only 3 counties in Hawaii-- Maui, Kauai, and Hawaii --provide language assistance in Japanese under Section 203.

---

[11] Honolulu county was dropped, eliminating Chinese and Filipino language assistance.

But the need for language assistance in the Asian American community is greater now than ever before. In the last decade, the Asian American population has experienced tremendous demographic changes which will eventually have a profound impact on the social and political dynamics of this county. According to the 1990 Census, there are 7.3 million Asian Americans in the United States, making up close to 3% of the total population. Between 1980 and 1990, the Asian American population increased over 107%, which makes it the fastest growing minority group in the country. More than 54% of the growth came from immigration. Currently, 7 out of 10 Asians are foreign born. It is estimated that close to 43% of the adult Limited English Proficient (LEP) population in California, New York, Hawaii, and Illinois are Asian language minorities. By the year 2000, the Asian American population is expected to be 10 million.

The five largest groups are Chinese Americans with 1.6 million or 22.6% of the total Asian American population; the Filipinos are the second largest with 1.4 million or 19.3%; Japanese are 847, 562 thousand or 11.7%; Asian Indians are 815,447 or 11.2%; Koreans are 798,949 or 11%; and Vietnamese are 614,546 or 8.4%. Most of the Asian American population is concentrated in five states: California, Hawaii, New York, Texas, and Illinois, with most Asians living in urban metropolitan areas.

According to the 1980 census, 73% of the Asian American population in New York City, 66% in Los Angeles, 53% in Chicago, and 56% in Houston spoke a language other than English at home (given that the large increase in population resulted from immigration, the percentage of Asians with limited English proficiency is probably much higher today). And yet, with the exception of Hawaii, none of these cities are in jurisdictions which qualify for Section 203 coverage for Asian language assistance. Even states like California, New York, Texas, and Illinois, which comprise 57% of the total mainland Asian American population, cannot meet that 5% threshold for Asian language assistance.

As the community gradually translates its tremendous demographic strength into political empowerment, the importance of language assistance in the electoral process cannot be underestimated for the Asian American community. Already, there has been a clear increase in the number of Asian Americans running for elected offices in the past few years and at which many voters expressed the need and desire for language assistance. In a voting survey undertaken by the Asian Pacific American Legal Center in Los Angeles of Asian American voters, 84% surveyed felt that bilingual ballots would be helpful and that they would be more likely to vote if language assistance were available.[12] Survey results from an exit poll conducted during the 1988 General Elections by the Asian American Legal Defense and Education Fund in New York showed similar findings: 70% surveyed said they would vote more often if there were Asian candidates, a majority said they preferred bilingual ballots, and that they would vote more often if bilingual ballots were available.

In the recent mayoral elections in San Francisco, where a Chinese American was running as a Democratic candidate, 12,879 new voters registered; 5,592 were Asian American. Although, San Francisco is not covered under Section 203, the county has been providing bilingual ballots mandated by a 1980 Consent Decree.

Despite the very limited impact that Section 203 has had in assisting Asian language minorities, it is, never-the-less, still a critical tool in insuring a strong and effective political participation in the future for the Asian American community. For now, though, Section 203 provides, at best, minimal provisions for Asian American language minorities and, at worst, direly inadequate protections against voting discrimination based on English language capacity.

This unintended, but never the less exclusionary, effect of the 5% criteria for Section 203 coverage can be almost immediately rectified by including a numerical population benchmark, such as 10,000, with the 5% figure so as to make it an "either/or" threshold: 5%, or 10,000, or more of the relevant population must be a language minority in a given county. The other 2 prongs of the criteria would still apply. Such a coverage formula would be sufficiently inclusive in reaching out to large but unserved Asian American language minorities in jurisdictions like Los Angeles and New York where the need for language assistance for Asian Americans is the greatest. For it is inconceivable that Congress intended for Section 203 to exclude the very members that the purpose of the law was supposed to include.

CONCLUSION

In February of this year, the U.S. Commission on Civil Rights published a 233 page report entitled "Civil Rights Issues Facing Asian Americans in the 90's." Its conclusion was that Asian Americans are the victims of widespread bigotry, discrimination, barriers to equal opportunity, and even violence. In his letter accompanying the report that was sent to the President and Congress, Commission Chairman Arthur Fletcher said, "Asian

---

[12] "Voting Rights Survey: Asian and Pacific Islander Americans in Los Angeles" conducted by Asian Pacific American Legal Center of Southern California, Feb. 1992

Americans suffer widely the pain and humiliation of bigotry and acts of violence. They also confront institutional discrimination in numerous domains, such as places of work and schools, in accessing public services, and in the administration of justice." The Asian American community finds the report conclusions and Chairman Fletcher's words disturbing and painful. Despite over 150 years of achievements and contributions in the progress and growth that has made our nation great, Asian Americans are still being excluded, are still being told we are "different": that we are not true Americans.

It is appropriate, then, that Congress is examining the reauthorization and improvement of Section 203 of the Voting Rights Act. Now more than ever, the fundamental right to vote must be protected for all Americans, but especially for excluded Americans. For each and every American, the right to vote is the right to voice: who we are, what we are, why we are Americans. Congress must uphold that most cherished privilege of our nation's basic principles.

The Japanese American Citizens League strongly urges the Congress to reauthorize Section 203 of the Voting Rights Act, with the suggested improvements in the triggering criteria for Section 203 coverage.

VOTING RIGHTS IMPROVEMENT ACT OF 1992 HR 4312

TESTIMONY FROM ESTHER YAZZIE, BA, MA
OFFICIAL STAFF COURT INTERPRETER
UNITED STATES COURTS
FOR THE DISTRICTS OF NEW MEXICO & ARIZONA

I am writing in support of HR 4312, the Voting Rights Improvement Act of 1992 which reauthorize § 203 of the Voting Rights Act. Although now I am the Official Navajo Court Interpreter for the United States District Courts, my first language was Navajo. My first exposure to English was when I began school at the Navajo Methodist Mission School when I was six years old. After completing both my primary and secondary education at that school, I went on to earn my Bachelor of Science and Master of Public Administration degrees from the University of New Mexico. I have always held positions in which I have had to extensively used the Navajo language including Navajo police radio dispatcher, Navajo policewoman, Navajo police clerk, Navajo deputy court clerk, and Navajo probation officer. Since 1979, I have worked as a Navajo interpreter, first in New Mexico and more recently in Arizona. I speak, read, and write Navajo, and have done formal course work in the language. I co-authored the English/Navajo Glossary of Legal Terms, and am the principal formulator, evaluator and chief examiner of the Federal Navajo Interpreter Certification Examination. I work with the Navajo language on a daily basis in Court proceedings and in out-of-court preparation.

In my experience both on and off the Navajo reservation, I have found that the language barrier still deeply effects the ability of Navajos to communicate and function capably in western society. For this reason, it is necessary to continue the application of § 203 of the Voting Rights Act. This act empowers our people. It brings equity to the voting process through supporting representative candidacies by Navajos, and safeguards against the voting strength of the Navajo electorate being diluted or fractured, so the full effect of its voting strength may be felt, regardless of their ability to speak English.

There are still many residents of the Navajo reservation and its surrounding states who are unable to communicate effectively in the English language and therefore, require extensive assistance in carrying out their day-to-day lives and civic duties. This necessitates the presence of auxiliary personal to assist them in the free exercise of their right to vote. Many of our people do not exercise this right and civic duty due to the fact that they do not understand the electoral process or, if they do understand it, they feel incapable of following the procedures which will allow them to fully enfranchise themselves.

In order to avail themselves of their-voting franchise, Native language speakers require the intervention and assistance of others who may assist them effectively to exercise this inalienable right guaranteed by the Constitution of the United States. The reauthorization of § 203 provide this type of support and the appropriate resources to assist in this endeavor. If the Navajo people are to become fully participatory citizens, with a voice in the affairs that affect their daily lives, they must be provided with the wherewithall to carry out this process.

We need politically experienced persons and capable interpreters to take this process to the people and bring them into the mainstream of the political process. There is a great need to undertake a voter education and registration campaign similar to those undertaken by the Black community in the South and by the Southwest Voter Registration Project for Hispanics. HR 4312 facilitates this process by making the voting process more accessible and understandable to the Navajo electorate.

In my years as a Navajo interpreter, I have seen that comprehension of the structure, nature and operation of the proceedings facilitates the passage of the person through the system, despite the fact that that system may be alien to the experience of the Navajo individual. This is true because the structure and function of many Western institutions, such as voting and candidates, are foreign to the Navajo experience, as are the state and federal court systems. For this reason, it is necessary that there be persons, programs, or institutions which bridge the gap between the day to day experiences common to the Navajo and the institutions which are outside of that experience. By mandating language assistance, HR 4312 provides a part of that bridge which is essential prior to instituting the balance of the structure necessary to incorporate the Navajo electorate more fully into the voting process.

It is mandatory that the federal government, as the trustee of the Indian people, ensure their full participation in the decision making processes which affect their lives so seriously and directly. It is the government's responsibility to provide for the edification of Indian citizens with regard to civic rights, duties and responsibilities. Reauthorizing § 203 constitutes an affirmative step in this direction. The federal government must protect the rights of the Native American people and assist them by every means possible to effectively exercise those rights. This requires providing Native American people with the preparation, education and comprehension necessary to select those candidates who can best represent their interests and aspirations.

My experience as an interpreter for the federal courts has shown me that, generally, when Navajo defendants come into the system, they are wholly unprepared to function in this environment which is totally foreign to them. Many Navajo defendants run afoul of the law and Anglo society's cultural norms and mores because they don't understand the Anglo system. Also, in many cases, they are confused as to the reasons for their arrest and by the conditions under which they are detained and incarcerated. On the average, I work with approximately 100 Navajos per year who require an interpreter in their dealings with the Federal court system in New Mexico and Arizona. I have found that many of the defendants either are older men or teenagers and young men who are alienated, culturally disoriented and lacking goals and direction. They feel powerless to have any effect on the system because they have no knowledge of the working of that system.

As an interpreter, I have found that there is no direct one-to-one correlation between English and Navajo terms. In order to interpret a single or multi-word expression from English to Navajo, I must provide an extensive descriptive narrative to make the concept clear. This is the case even when the person seems to understand English. For example, many people traveling abroad have had the experience of being able to understand the local language well enough to find their way to the museum or order from a menu. However, they would find they could understand only small bits of an actual conversation and a local newspaper would be incomprehensible, both in language and content. This is the position in which many Native Americans find themselves.

Often, the English vocabulary of Navajo-speaking (or other Native language-speaking) people is extremely limited, effective in the grocery store or restaurant, but insufficient for in-depth conversation, or understanding technical and complex legal concepts and terminology. Since few, if any, Native languages have equivalent terminology for most legal and electoral terms, trained interpreters must be present when the material goes beyond a certain level of complexity, even for Native Americans who speak some English. Certainly their assistance is mandatory for those who do not speak English. Section 203 of the Voting Rights Act mandates the assistance necessary for Indian people to fully enjoy their suffrage rights.

Through sound education about the electoral process, Native American people will feel capable of making an impact, will develop their roles as active decision-makers and will become participants in the political and governmental aspects of their lives. Rather than suppressing their feelings about incomprehensible, unsatisfactory governmental influences, they will become vocal through their selection of representatives on the ballots.

Representative advocates are necessary to ensure that the Native American's perspectives, needs, and interests are represented at all levels of government. While, presently, there are some elected officials who are aware that there are distinctive Native American issues and aspirations, often their perception of what those issues and aspiration are is simply wrong. These misperceptions often result in their erring with regard to the content, quantity, and direction of the programs which they offer to Native American people. To prevent further misguided, though well-intentioned, programs and legislation from being imposed on Native Americans, they must become their own spokesmen, legislators, and advocates, for they know best what their problems are and how they can best be resolved.

But, who must be their voice? Capable candidates, who are truly representative of Native American people, can only come from an active and informed electorate. Rather than self-appointed advocates or persons selected by agencies outside the Native American body politic, representatives must be selected by the people themselves. Candidates who have come through the ranks with their grassroots ties intact, and have proven themselves worthy of the heavy responsibility bestowed upon them by their own people, will surface from such an electorate. Only then will Native American people's interests truly be represented.

Reauthorization of § 203 is the first step in building this infrastructure of extensive and varied participation of Native American people from all strata of the reservations and communities throughout the nation. Just as the Civil Rights Act and the Voting Rights Act have opened up the political process to the participation and election of Black and Hispanic candidates in districts where none were previously represented, the § 203 has the potential to open to Native Americans the same privileges and opportunities.

JOINT TESTIMONY OF
THE NATIVE AMERICAN RIGHTS FUND
AND THE NATIONAL CONGRESS OF AMERICAN INDIANS

BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

ON
REAUTHORIZING §203 OF THE VOTING RIGHTS ACT

Table of Contents

Page

I. Introduction 1

II. Section 203 Should be Reauthorized 4

- A. Educational Inequities 4
- B. Disenfranchisement of Native Americans 9
- C. Native American Political Participation 12
- D. The Language Barrier 17

III. Section 203 Should Be Amended In Accordance With H.R. 4312 20

- A. Problems With §203's Current Coverage Standard 20
- B. An Alternative Standard of Comparison for Native Americans 25
- C. Federal Policy Supports the Alternative Standard of H.R. 4312 28

Appendix

Tribal Resolutions of Support:

Pueblo of Isleta, New Mexico
Tohono O'odham Nation, Arizona
Turtle Mountain Band of Chippewa, North Dakota

I. Introduction

Mr. Chairman and members of the Subcommittee, the Native American Rights Fund (NARF) and the National Congress of American Indians (NCAI) appreciate this opportunity to jointly testify in support of H.R. 4312, the Voting Rights Improvement Act of 1992. The Native American Rights Fund is the nation's largest nonprofit Indian law firm, representing Indian tribes and groups nationwide. NARF submits this testimony on behalf of the Pueblo of Isleta, New Mexico and the Tohono O'odham Nation of Arizona. They are federally recognized Indian tribes with significant percentages of limited English proficient tribal members who do not now receive assistance under §203. The National Congress of American Indians (NCAI) is the oldest and largest intertribal organization of American Indian and Alaska Native tribes in the United States. Founded in 1944, NCAI represents the interests of 130 member tribes and is the only intertribal organization with legislative powers.

NARF and NCAI strongly support H.R. 4312. We urge that any legislation reported out by the Subcommittee incorporate all substantive provisions of H.R. 4312, including a 15-year extension of §203, an alternative coverage standard for Native Americans, and a 10,000-person benchmark. By reauthorizing §203, H.R. 4312 protects the constitutional rights of Native Americans. It guarantees that §203's benefits will continue to enfranchise Indian people until the entire Voting Rights Act comes up for review in 15 years. H.R. 4312 also improves §203 by adding an alternative standard of comparison for Indian language speakers.

This alternative standard fulfills the original goals of the Voting Rights Act and its 1982 amendments by better identifying those Indian language speakers who need assistance in voting.

Section 203's current standard excludes many Native Americans with limited English skills because it does not consider the unique demography, geography, and history of Indian reservations. Native Americans comprise less than one percent of the total United States population, and only a small fraction of these have limited English skills. Most limited English proficient Native Americans live on reservations which are bisected by state and county lines.

The current standard, which compares the number of limited English proficient Native Americans of voting age to the total county voting age population, fragments already small reservation populations into county segments which are smaller still. As a result, most tribal populations find it impossible to meet the current standard. By failing to consider the reservation Indian population as a whole, the current standard excludes many Native Americans who need language assistance to vote.

For example, §203 excludes entire reservations with high percentages of limited English proficient voters, such as the Tohono O'odham Nation of Arizona and the Pueblo of Isleta, New Mexico. Elsewhere, §203 covers only part of the reservation. On the Cheyenne River Reservation in South Dakota, for example, only one of the two reservation counties meets §203's current standard. Consequently, only those voters in the covered county receive assistance, even though Native Americans in the adjoining county speak the same language, reside on the same reservation, and vote in the same elections. H.R. 4312 provides an alternative standard of comparison for Native Americans which evaluates the reservation Indian population as a whole, thus alleviating the divisive effects of county lines on reservations like Tohono O'odham, Cheyenne River, and the Pueblo of Isleta.

While significant progress has been made in enfranchising Native Americans, the need for §203 has not diminished in the 17 years since Congress added that section to the Voting Rights Act. Historically disenfranchised, Native Americans continue to need and to use language assistance in the electoral process today. This assistance enables those who understand their own language better than they understand English to effectively participate in the democratic process.

Since Native American languages are traditionally unwritten, §203 requires only oral assistance. The cost of providing oral rather than written assistance is relatively low, and few counties are covered for Indian languages. As such, the benefits of §203--empowering a disenfranchised, disadvantaged segment of American society--outweigh the effect on local governments. We urge Congress to reauthorize and amend §203 in accordance with H.R. 4312.

II. Section 203 Should be Reauthorized

Congress added §203 to the Voting Rights Act in 1975 because it found that educational inequality and historic disenfranchisement of Native Americans and other language minority groups prohibited full participation in the democratic process.[1] While progress has been made in Native American education and political participation, many of the obstacles which confronted Native American citizens in 1975 still exist today.

A. Educational Inequities

Native Americans have been impacted by non-Indian educational systems since the earliest European contact. Education has been used as a tool to intentionally, and in many cases effectively, destroy tribal cultures. The modern state of Native American education is a direct result of this dismal past, and cannot be understood without a brief review of the path that brought us to the present.

Until relatively recently, federal policy dictated that education should play a primary role in "civilizing" American Indians.[2] The federal government originally contracted religious organizations to educate Indian people but in 1879 began educating Indians directly through the notorious boarding school system.[3] Federal boarding schools were considered "an ideal method of assimilation, since Indian youth were completely removed from the family and from the barbarism of tribal life."[4] The effect of separating Indian children from tribal culture proved disastrous:

---

[1] See e.g. S. Rep. No. 94-295, 94th Cong., 1st Sess. 24 et seq. (1975).

[2] Felix S. Cohen's Handbook of Federal Indian Law 679 (R. Strickland ed. 1982) [hereinafter Cohen].

> At the beginning of the twentieth century the status of the Indian was not only bleak, it was hovering on the edge of disaster. The dual inheritance of the assimilation policies of education and land allotment had already given some indication of their potential ability to damage if not destroy a majority of the Indian people.[5]

Later, when Congress revived the assimilation policy of the 19th century under the guise of "termination" in the 1950's, education was seen as a vehicle for "moving Indians into the mainstream of American society."[6] The federal policy of termination was repudiated in favor of tribal self-determination in the early 1960's, yet it was not until the passage of federal legislation in the 1970's that Indian tribes gained some measure of control over their children's education.[7]

In 1969, a Senate subcommittee investigating the state of Indian education issued a report appropriately titled "Indian

---

[3] Id. at 140.

[4] Id.

[5] M. Szasz, Education and the American Indian 10 (1977).

[6] Cohen, supra note 2, at 177.

[7] Id. at 180-188.

Education: A National Tragedy--A National Challenge."[8] The subcommittee characterized Indian education as a national tragedy "both because of its lack of success in preventing high rates of illiteracy and dropping out, and because it ignored the needs and culture of Indian people."[9]

The effectiveness of Indian education remains an issue of major concern today. Recently, the President appointed Native American educators to a special White House Conference on Indian Education to be conducted during 1991 and 1992. The Conference concluded in early 1992, with a meeting of delegates from Indian communities nationwide. The Conference report, with findings and recommendations, will be released later this year.

In a separate initiative, the U.S. Department of Education recently chartered a task force to evaluate the current status of Indian education and make recommendations for improvement. The task force just released its report in October, 1991, entitled Indian Nations at Risk: An Educational Strategy for Action.[10]

While "some progress" had been made since 1969 when the National Tragedy report was issued,[11] the Nations at Risk task force concluded that "it is evident that the existing educational systems, whether they be public or federal, have not effectively met the educational, cultural, economic, and social needs of Native communities."[12] The task force found that "Native children must overcome a number of barriers, if schools are to succeed in their mission to educate."[13] Among the many barriers listed in the Nations at Risk report, the task force listed (1) "overt and subtle racism in schools Native children attend, combined with the lack of a multicultural focus in the schools," (2) "unequal and unpredictable funding for preschool and many elementary, secondary, postsecondary programs and for tribal colleges," (3) "low expectations and relegation to low ability tracks that result in poor academic achievement among up to 60 percent of Native students," (4) "extremely high dropout rates," (5) poorly trained teachers and inadequate library resources, (6) "limited access to colleges and universities because of insufficient funding," and (7) "economic and social problems in families and communities . . . [which] act as direct barriers to the education of Native children."

---

[8] Special Subcomm. on Indian Education of the Senate Comm. on Labor and Public Welfare. S. Rep. No. 501, 91st Cong., 1st Sess. (1969) [hereinafter National Tragedy].

[9] Cohen, supra note 2, at 678.

[10] U.S. Dept. of Education, Indian Nations at Risk: An Educational Strategy for Action (1991) [hereinafter Nations at Risk].

[11] Id. at 11.

The Nations at Risk task force noted that 32.3 percent--about one-third--of Native American eighth-grade students perform at a "below basic" level in mathematics, compared to only 15.5 percent of White eighth-graders.[14] The Native American figure for "below basic" math and science levels also exceeds those of Asian, Hispanic, and Black students.[15] Not coincidentally, almost 9 percent of Native American eighth graders have limited English ability.[16]

---

[12] Id. at 12.

[13] Id. at 7.

[14] Id. at 9

The high school drop out rate for Native Americans exceeds that of any other racial group in the United States. The Nations at Risk report shows that 36 percent of Native American tenth-grade students in 1980 later dropped out of school, compared to only 15 percent of White students, 8 percent of Asian students, 22 percent of Black students, and 28 percent of Hispanic students. As the Nations at Risk task force noted, Native Americans have "the highest high school dropout rate in the nation."[17]

Native Americans today face educational disparities which present obstacles to full political participation in non-Indian politics. In a 1984 poll of tribal leaders, almost two-thirds listed "low education levels" as either "a barrier" or "the greatest barrier" to Native American political participation.[18] Three-quarters listed "apathy," which together with low education "form a common syndrome for non-participatory habits in other voting behavior studies" on other minority groups.[19] The result? According to the Nations at Risk task force: "Without education they [i.e. Native Americans] are disempowered and disenfranchised."[20]

---

[15] Nations at Risk, supra note 10, at 9.

[16] H. Hodgkinson. The Demographics of American Indians: One Percent of the People; Fifty Percent of the Diversity 23 (1990) (citing National Center for Education Statistics, National Educational Longitudinal Study of 1988, A Profile of the Eighth Grader (July 1990)).

[17] Nations at Risk, supra note 10, at 7.

[18] National Indian Youth Council, National American Indian Leadership Poll 20 (1984).

B. Disenfranchisement of Native Americans

The Voting Rights Act made the political process much more accessible to Native Americans and as a result, more Native Americans are participating in local, state and federal elections than ever before. However, various factors still impede Native Americans from fully exercising their political rights, including language barriers and racial discrimination.

Native Americans were an historically disenfranchised people. Although Native Americans have inhabited North America longer than any other segment of American society, they were the last group to receive the right to vote when the United States finally made them citizens in 1924.[21] Even after 1924, certain states with large native populations barred Native Americans from voting by setting discriminatory voter registration requirements.[22] It was not until 1948 that Native Americans in

---

[19] Id. at 21.

[20] Nations at Risk, supra note 10, at 7.

[21] 43 Stat. 253 (1924).

[22] See D. McCool, *Indian Voting*, in American Indian Policy in the Twentieth Century 105 (V. Deloria ed. 1985); Wolfley, Jim Crow, Indian Style: The Disenfranchisement of Native Americans, 16 Am. Ind. L. Rev. 167 (1991).

Arizona and New Mexico gained the right to vote,[23] long after thousands fought and died for the United States in two world wars. Indian citizens in Utah could not vote until *1957*![24]

One commentator declared this "heritage of disenfranchisement . . . [to be] certainly as severe, if not more so, than that of other minorities,"[25] and stated that the relatively low Native American voter turnout of the 1970's was "a direct result of past discrimination."[26] As recently as 1984, in a survey of 319 tribal leaders nationwide, over half (53 percent) cited past discrimination as either "a barrier" or as "the greatest barrier" to Indian participation in the political process.[27] Clearly, the effects of historic disenfranchisement of Native Americans linger today in Indian country.

Even more alarming, discrimination against Native American voters continues today, as evidenced by the many lawsuits brought in the past two decades by the U.S. Department of Justice or Indian individuals to enforce the provisions of the

---

[23] *Harrison v. Laveen*, 67 Ariz. 337 (1948); *Trujillo v. Garley* (D.N.M. 1948).

[24] Act of Feb. 14, 1957, ch. 38, 1957 Utah Laws 89-90.

[25] L. Ritt, *Some Social and Political Views of American Indians*, 6 Ethnicity 66 (1979).

[26] *Id.* at 55.

[27] National Indian Youth Council, *National American Indian Leadership Poll* 22 (1984)

Voting Rights Act.[28] After reviewing these cases in detail, one commentator concluded:

> With the passage of the Voting Rights Act of 1965, Indians have intensified the fight for increased political participation and have made great strides in defeating the various discriminatory state voting schemes. Indians will

---

[28] See, e.g. United States v. San Juan County, New Mexico, C.A. No. 79-508-JB (D.N.M., filed Nov. 22, 1983; consent decree Apr. 8, 1980) (§203 violation); United States V. San Juan County, Utah, C.A. No. C-83-1297 (D. Utah, filed Nov. 22, 1983; consent decree Oct. 11, 1990) (§203 violation); United States v. McKinley County, New Mexico, C.A. No. 86-0029-M (filed Jan. 9, 1986; consent decree Oct. 9, 1990) (§203 violation); United States v. State of New Mexico and Sandoval County, C.A. No. 88-1457-SC (D.N.M., filed Dec. 5, 1988; consent decree May 17, 1990) (§203 violation); United States v. Thurston County, Nebraska, No. 78-0-380 (D. Neb. May 9, 1979, consent decree) (vote dilution based on at-large method of electing county board of supervisors); United States v. Town of Bartelme, No. 78-C-101 (E.D. Wis. Feb 17, 1978) (county refused to allow Indian reservation residents to vote after approving a petition severing the town form the reservation); Windy Boy v. County of Big Horn, Montana, 647 F.Supp. 1002 (D. Mont. 1986); Tso v. Cuba Indep. School Dist., No. 85-1023-JB (May 18, 1987 consent decree); Largo v. McKinley Consol. School Dist., No. 84-1751 HB (Nov. 26, 1984); Estevan v. Grants-Cibola County School Dist., Nol 84-1752 HB (Nov. 26, 1984); Clark v. Holbrook Pub. School Dist., No. 3, No. 88-0148 PCTRGS (D. Ariz. 1983); Cuthair v. Montezuma-Cortez, Col. School Dist., No. RE-1, No. 89-C-964 (D. Colo. 1990 consent decree); Buckanaga v. Sisseton School Dist., 804 F.2d 469 (8th Cir. 1986; consent decree 1988) (the previous seven cases involved vote dilution based on at-large election methods); Love v. Lumberton City Board of Educ., No. 87-105-CIV-3 (D.N.C. 1987) (successful challenge to multi-member districting); American Horse v. Kundert, No. 84-5159 (D.S.D. Nov. 5, 1984) (county auditor refused to accept voter registration cards from Indian registration drive); Fiddler v. Sisker, No. 85-3050 (D.S.D. May 14, 1986 stipulation for settlement) (county auditor limited the number of application forms given to Indian registrars to 10 to 15 each, despite fact that registrars had to drive 80 miles round trip to begin the registration drive); Black Bull v. Dupree School Dist. No. 64-2, NO. 86-3012 (D.S.D. May 14, 1986 stipulation for settlement) (court ordered the establishment of four polling places on Cheyenne River Reservation, where Indian voters had to travel up to 150 miles round trip to vote); Sanchez v. King, 550 F. Supp. 13 (D.N.M. 1982), aff'd 459 U.S. 801 (1983) (successful challenge to state reapportionment plan); Ratcliff v. Municipality of Anchorage, No. A86-036 (D. Alaska 1989) (Alaska Natives challenged city reapportionment plan).

> continue to face the enduring legacy of racial discrimination as the campaign for equal voting rights spreads throughout Indian Country. Indians now know they can significantly influence the local political decision-making policies that affect their lives. Thus, Indians will continue to seek the goal of political equality envisioned in the fifteenth amendment and the Voting Rights Act of 1965.[29]

C. **Native American Political Participation**

As a result of being intentionally excluded from non-Indian politics for so long, Native Americans are just beginning to understand and to use their political strength. Recent studies show considerable Native American interest in non-tribal politics. A 1983 National Indian Youth Council (NIYC) survey--the first scientific public opinion poll ever conducted exclusively on Native Americans--found that "Indian voters are surprisingly active, discriminating, and genuinely concerned about their problems and the problems of others."[30]

The NIYC surveyed 221 Navajo Indians and 181 Pueblo Indians in northwestern New Mexico.[31] The survey results showed "that non-tribal political participation patterns of Indians [defined as working on a political campaign, trying to persuade others to vote in a certain way, attending political meetings, and contributing money to a candidate or party] are quite similar to the general public."[32] About 60 percent of the respondents were registered to vote.[33] This figure compares favorably to the national average of registered voters. The U.S. Census Bureau determined that approximately 64 percent of voting age citizens nationwide were registered to vote in 1982.[34]

---

[29] Wolfley, *supra* note 22, at 202.

[30] National Indian Youth Council, *American Indian Political Attitudes and Behavior Survey* vii (1983).

[31] *Id*. at 8. NARF's client, the Pueblo of Isleta, was not one of the six pueblos surveyed.

In 1984, the NIYC published another report which focused exclusively on Navajo Indians.[35] The NIYC interviewed twice as many Navajo respondents in 1984 than it had in 1983 (448 versus 221 respondents), yet the findings of the two studies with regard to political participation correlated well. Like the earlier study, the 1984 survey found "a high level of participation by Navajo voters."[36] Fully 81 percent stated that they were registered to vote.[37] Two-thirds had voted in the last general election.[38] A majority (58 percent) indicated that they were "somewhat or very" interested in the impending 1984 elections.[39]

---

[32] Id. at xii.

[33] Id. at xiii.

[34] U.S. Bureau of the Census, Voting and Registration in the Election of November 1990 (1991).

[35] National Indian Youth Council, Navajo Indian Political Attitudes and Behavior Poll (1984).

[36] Id. at 28.

[37] Id.

[38] Id.

[39] Id.

The NIYC published the results of a third Indian voting survey in 1986.[40] This one examined the political behavior of two Arizona tribes: NARF's client, the Tohono O'odham Tribe, and their neighbors on the Gila River Reservation. NIYC interviewed 200 people--100 on each reservation. Just under half of those surveyed at Tohono O'odham (42 percent) were registered voters, and about half of those (25 percent of the total) reported voting in the last general election.[41] Three-quarters (75 percent) of the Tohono O'odham respondents stated that they were either "somewhat" or "very much" interested in following state and national campaigns.[42] With regard to questions concerning political participation, the Tohono O'odham responses were quite similar to the Navajo and Pueblo surveys of 1983 and 1984: 13 percent had attended political meetings, 25 percent had tried to convince others to vote a certain way, and 9 percent had contributed money to a candidate or a political party.[43]

The NIYC studies belie the stereotypic view that Native Americans are disinterested in state and federal politics. They corroborate the conclusions of Leonard Ritt, who examined Native American political views on a variety of contemporary issues including women's rights, abortion, gun control, and the death penalty, among others. Ritt concluded that:

---

[40] National Indian Youth Council, Political and Attitudes Behavior Poll at Tohono O'odham and Gila River, Arizona (1986).

[41] Id. at 2-3.

[42] Id. at 6.

[43] Id. at 14.

> [T]here are strong indications that the political perspectives of Native Americans range far beyond those issues which pertain only to them. For example, the number of Native American respondents who profess "no opinion" to the NORC Survey questions is very small. This piece of evidence alone should give pause to those who argue that Anglo political concepts are "meaningless" to Native Americans.[44]

Native Americans' concern for non-tribal politics and off-reservation affairs is evidenced by their increased participation in local, state and federal elections following enactment of the Voting Rights Act in 1965. Unfortunately, "[a]ggregate registration data for American Indians are not generally available because the racial identification of voters often is not required by states, while survey research is difficult to conduct because of language and cultural barriers and the remoteness of areas in which Indians live."[45] Native Americans comprise such a small percentage of the United States population (less than 1 percent) that if information on them is collected at all, it is usually lumped into the "other" category.[46] Nevertheless, the surveys that are available all indicate an increase in Native American registration and turnout since passage of the Voting Rights Act.

---

[44] Ritt, supra note 25, at 51.

[45] McDonald, The Quiet Revolution in Minority Voting Rights, 42 Vand. L. Rev. 1249, 1253 (1989).

[46] Ritt, supra note 25, at 47.

For example, McCool reported that voter turnout for reservation precincts on seven Arizona Indian reservations rose from 11,789 in 1972 to 15,982 in 1980.[47] Voter turnout on the Tohono O'odham Reservation alone rose 92 percent between 1976 and 1980.[48] After analyzing Indian registration and voting for selected counties in Arizona in the 1976 election, McCool concluded that while "a smaller percentage of Indians register to vote, . . . those who go to the trouble of registering go to the polls and vote at a higher rate than whites."[49] Consistent with McCool's findings, another commentator noted that "[i]n Big Horn County, Montana, where Crow and Northern Cheyenne comprise forty-one percent of the voting age population and where discrimination against Indians in the political process has been severe, Indians and whites now register at about the same rates."[50]

As a result of increased Native American voter registration and turnout facilitated by the Voting Rights Act, the number of Indian elected officials has risen significantly. For example, in 1966, 15 Native Americans were elected to state legislatures.[51] In 1986, 49 Native Americans served in state governments.[52] An even more dramatic impact has occurred at the local level. Although statistics on Native American elected officials are not generally available for pre-Voting Rights Act years, we know that in 1986 there were at least 852 Indians in non-tribal offices. Ninety percent of these served on local school boards.[53]

---

[47] McCool, supra note 26, at 119-120.

[48] Id. at 119.

[49] Id. at 127.

[50] McDonald, supra note 45, at 1253.

[51] McCool, supra note 22, at 129.

The studies cited above indicate that at a time when overall voter registration and turnout nationwide is dropping,[54] Native American political participation is on the rise, largely as a result of the Voting Rights Act. Nevertheless, despite the positive affects of the Voting Rights Act on Native Americans, barriers to full enfranchisement remain, one of which involves English-only elections.

D. The Language Barrier

No one knows how many Native American language speakers live in the United States today. The U.S. Census Bureau is the only agency which systematically estimates the English-language proficiency of Indian-language speakers, through the use of its long form in the decennial census. The census data may be relatively inaccurate since the long form is sent to only a small percentage of United States households. Given the low incidence of Native Americans in the general population, probably only a handful of these are Indian households. The long form also requires non-English proficient Native Americans to read and respond to questions written in English concerning their ability to speak English, without the assistance of a translator.

---

[52] McDonald, *supra* note 45, at 1252 n. 11 (citing National Indian Youth Council, *Indian Elected Officials Directory* (1986)).

[53] *Id.*

[54] U.S. Census Bureau, *supra* note 34, at 2-3.

Nevertheless, the census data offers some insight regarding Native American language use in the United States today. Using 1980 data, the Census Bureau identified about 33 reservations where more than 75 percent of the Native American population over five years of age spoke a language other than English at home.[55] The comparable 1990 figures are not yet available.

The actual number of individuals speaking an Indian language on any given Indian reservation, as well as their relative proficiency in English, is not known. The figures will certainly vary from tribe to tribe, as illustrated by NARF's clients, the Tohono O'odham Nation of Arizona and the Pueblo of Isleta, New Mexico. The Tohono O'odham Nation estimates that over 80 percent of their voting age tribal members speak the O'odham language.[56] Only about half of the members over 18 years old also speak English.[57] The Pueblo of Isleta estimates that perhaps 55 percent of their voting age population speak their language (Tiwa).[58] About 10 percent of those over 18 do not speak English, while about 20 percent do not read English.[59]

---

[55] U.S. Bureau of the Census, 1980 Census of Population, General Social and Economic Characteristics, Social Characteristics for American Indian Persons on Reservations and Alaska Native Villages: 1980 (1983).

[56] Letter from M. Antone to P. Rogers (Feb. 25, 1992).

[57] Id.

These two reservations illustrate that significant percentages of Native Americans have limited English skills and will benefit from language assistance in the electoral process. Yet no language assistance is offered to these two tribes at all under the Voting Rights Act for reasons that will be addressed below. As in 1975 when the bilingual provisions were added to the Voting Rights Act, English-only elections still impede full Native American political participation on reservations like the Tohono O'odham and the Pueblo of Isleta.

A 1984 National Indian Youth Council (NIYC) survey of 319 tribal leaders nationwide confirms this view. Fully 37 percent of the respondents identified "language differences," and 25 percent identified "English language ballots," as either "a barrier" or "the greatest barrier" to Native American political participation.[60] An earlier NIYC survey of Navajo and Pueblo Indians in northwestern New Mexico found that almost half the Pueblo respondents (about 48 percent) were "more comfortable" speaking their own language than English.[61] In addition, almost two-thirds (62 percent) of respondents expressing a preference for their own language were registered voters.[62]

---

[58] Letter from A. Lucero to P. Rogers (Feb. 7, 1992).

[59] Id.

[60] NIYC, supra note 27, at 22.

[61] NIYC, supra note 30, at 9.

Clearly, many Native American voters need language assistance in order to exercise their constitutional right to vote. Section 203 of the Voting Rights Act must be reauthorized to assure Indian people a voice in our representative democracy, regardless of whether that voice speaks in English or in one of the many original languages of North America.

III. Section 203 Should Be Amended In Accordance With H.R. 4312

H.R. 4312 provides an alternative to §203's current standard for determining which counties will be required to provide language assistance in Native American languages in the electoral process. NARF and NCAI applaud this effort. We believe the alternative standard of comparison for Native Americans in H.R. 4312 will further the original goal of §203--enfranchising language minorities--by better identifying those Native Americans who could benefit from assistance at the polls.

A. Problems With §203's Current Coverage Formula

Today, only 15 counties in the entire United States are required to provide language assistance in Native American languages under §203 alone.[63] This represents a decrease of about 80 percent from the number of counties outside Alaska which were covered by §203 for Native American languages prior to the

---

[62] Id. at 53.

[63] 28 C.F.R. ch. 1, Pt. 55 (1990). A few counties provide assistance under §4(f)(4) alone or under both §4(f)(4) and §203.

1982 amendment. Many limited English proficient Native Americans no longer receive assistance under §203 because the current coverage formula fails to identify them.

Section 203's current standard is nearly impossible for most tribes to meet because it does not consider native peoples' unique history and demography--factors which set them apart from all other language minorities. Native American populations nationwide are relatively low. American Indians and Alaska Natives combined comprise less than one percent of the nation's population, according to the 1990 decennial census.[64] Only about one-third of these live on reservations or other tribal lands. An even smaller percentage of Native Americans on reservations speak English poorly enough to be covered by §203. Nevertheless, limited English proficient Native Americans must exceed five percent of a county's total voting age population in order to receive assistance under §203.

In addition to overlooking Native American demographics, §203's current coverage formula fails to consider the unique history and geography of Indian reservations. Section 203's current standard is based on the total voting age population of a county, rather than on the Native American population of a reservation as H.R. 4312 suggests. Unfortunately, reservation boundaries rarely coincide with county lines. History shows that many Indian reservations were established in federal territory by treaties or other federal actions long before those territories became states. State and county lines were later imposed on Indian reservations without regard for reservation boundaries when the new states entered the Union. As a result, most reservations are split into one or more counties, and several overlap two or three states.

---

[64] In comparison, Hispanics comprised 9 percent, and Asian or Pacific Islanders comprised about 3 percent of the total United States population, according to the 1990 census.

State and county lines artificially divide already small reservation populations such that most cannot exceed 5 percent of the county residents over the age of 18. Since these Native Americans rely on language assistance to participate in non-Indian politics, the practical result of the current standard is disenfranchisement. The divisive effect of county lines is particularly apparent where comparatively large off-reservation populations reside in the same county as an Indian reservation.

For example, the Tohono O'odham Reservation spans three counties in southern Arizona. Most of the reservation lies in Pima County, as does the city of Tucson. According to the 1990 census, the Tohono O'odham Nation is the fifth largest tribe in the United States, with about 8,500 members living on the reservation.[65] The tribe estimates that approximately *80 percent* of its voting age members speak the Tohono O'odham language, and that only about *half* of these also speak English.[66] The 1990 census data indicates that of the 8,500 tribal members, about 4,500 live on the reservation in Pima County and were more than 18 years old. Pima County had a total voting age population of 500,682 in 1990, according to the decennial census, with two-thirds living in Tucson.[67] No figures are available regarding the number of voting age, limited English proficient Tohono O'odham people who live in Pima County as opposed to the other two reservation counties. However, even if all 4,500 voting age Tohono O'odham members on the reservation in Pima County are limited English proficient, they would still comprise less than 1 percent of the total county voting age population. As a result, they receive no assistance under §203.

---

[65] The tribe itself estimates the number of members living on the reservation at about 11,447, which may indicate a Census Bureau undercount.

[66] Letter from M. Antone to P. Rogers (Feb. 25, 1992).

The Pueblo of Isleta, New Mexico provides another telling example. The Pueblo straddles two counties, one of which also hosts the large city of Albuquerque. Although the Pueblo reports that a majority of its voting age members (55 percent) speak Tiwa, and that about 15 to 20 percent of these understand Tiwa better than they understand English,[68] neither Pueblo county is covered by §203. The Census Bureau counted about 1,350 Isleta Pueblo members over the age of 18 who lived on the Pueblo in Bernalillo County in 1990. Bernalillo County, which also contains Albuquerque, had a total voting age population of about 355,000 in 1990, according to the Census Bureau. Even if all 1,350 voting age Isleta Pueblo members in Bernalillo County were limited English proficient, they would still comprise less than one-half of one percent of the total voting age population Berralillo County. It is therefore not surprising that the Pueblo of Isleta receives no assistance at all under §203.

---

[67] Tucson has a population of approximately 331,000, according to the 1990 World Almanac.

[68] Letter from A. Lucero to P. Rogers (Feb. 7, 1992).

The Tohono O'odham Nation and the Pueblo of Isleta cogently illustrate the shortcomings of §203's current coverage formula. Unfortunately, they are not unique. Many other reservations with significant percentages of limited English proficient Native Americans are excluded from §203's coverage as well. It is common knowledge that many Indian reservations are notoriously underdeveloped and sparsely populated compared to surrounding non-Indian lands. Many reservations share counties with large off-reservation non-Indian populations whose sheer numbers overwhelm their Native American neighbors for §203's purposes. As a result, reservations with significant populations needing language assistance in voting do not necessarily receive it under §203.

In addition to excluding many reservations altogether, §203's current coverage formula sometimes leads to split coverage of the same reservation. Two striking examples of this are the Cheyenne River Sioux Reservation in South Dakota and the Standing Rock Sioux Reservation, which spans North and South Dakota. Both reservations contain two counties, yet §203 covers only one county on each reservation. As a result, some Lakota speakers on these two reservations receive (or more accurately, are supposed to receive) assistance under §203, while their neighbors on the same reservation in the adjoining county do not--even though they all speak the same language, live on the same reservation, and vote in the same elections! This apparently occurs because the percent of limited English proficient Sioux Indians of voting age exceeds 5 percent of the total county voting age population in only one of the two reservation counties.

B. An Alternative Standard of Comparison for Native Americans

H.R. 4312 offers an intelligent solution to the inequities resulting from §203's current coverage formula. By providing an alternative standard of comparison for Native Americans which treats Indian reservations in a unified way, it diffuses the detrimental effects of county lines. Under H.R. 4312, counties containing Indian lands will be required to provide assistance in the appropriate Indian language if more than 5 percent of the total voting age population of Native Americans living on the reservation cannot speak or understand English well enough to participate in the electoral process.

NARF and NCAI believe this to be a fair standard which will more accurately identify Native Americans requiring language assistance. In doing so, it will fulfill the original purpose of §203, which was to end discrimination against language minority citizens and permit them to fully participate in the democratic process. Some tribes will surely continue to qualify for language assistance under the existing county-based standard, but many will not. For this latter group, the alternative standard of comparison provided by H.R. 4312 offers a chance to receive the necessary assistance in their own languages.

We predict that the affect on local governments of H.R. 4312's alternative standard of comparison for Native Americans will be minimal, for several reasons. First, of the hundreds of counties in the United States, relatively few will be required to provide assistance to Native Americans since, as explained above, limited English proficient Native Americans comprise a relatively small percentage of the total United States population. Second, counties may target assistance to those precincts where limited English proficient Native Americans vote.[69] Under the proposed alternative standard, counties need not expend funds on language assistance in areas where no one needs it.

Third, since Native American languages are traditionally unwritten, only oral assistance is required under §203.[70] In a comprehensive study of the costs of bilingual voting assistance in the 1984 general election,[71] the General Accounting Office (GAO) found the costs of oral assistance in Hispanic, Asian, and Native American languages to be minimal.

Of the 318 responding counties, 259 provided oral assistance. The GAO estimated that the vast majority of these (79 percent) incurred no extra costs whatsoever for providing oral assistance because they either hired bilingual instead of monolingual poll workers or utilized bilingual volunteers.[72] Several of these are counties which must provide oral assistance in Native American languages under §203, including Apache County, Arizona (Navajo Reservation), Soccoro County, New Mexico (Navajo Reservation), Sioux County, North Dakota (Standing Rock Reservation), Dewey County, South Dakota (Cheyenne River Reservation), and Jackson County, Wisconsin (Winnebago Reservation).[73] Others reported only minimal costs, such as the $63.00 expended by Adair County, Oklahoma to provide oral assistance to members of the Cherokee Nation.[74]

---

[69] 28 C.F.R. §55.17 (1990).

[70] Id. at §55.12(c) (1990).

[71] U.S. General Accounting Office, Bilingual Voting Assistance--Costs of and Use During the November 1984 General Election (1986).

In light of the GAO's findings, the alternative standard for Native Americans proposed by H.R. 4312 would not burden local governments.[75] Any impact incurred by county governments would pale before the benefits gained by protecting the constitutional rights of Native Americans--arguably the most underrepresented citizens in the United States today.

---

[72] Id. at 20.

[73] Id. at 50-57.

[74] Id.

[75] In a recent report by the Mexican American Legal Defense and Education Fund entitled Bilingual Elections: Latinos, Language and Voting Rights, Apache County, Arizona reported spending about $94,200 annually for compliance with the Voting Rights Act. However, this sum does not represent the typical cost of providing oral assistance under §203 for several reasons: (1) this is the total cost of compliance with the terms of a consent decree covering numerous violations of the Voting Rights Act, not just §203; (2) Apache County has more Indian residents than any other county in the United States, according to the 1990 census; and (3) most Indian residents of Apache County are Navajo, the largest tribe in the United States and probably the tribe with the greatest number of limited English proficient members. As such, Apache County really represents a "worst case" scenario.

C. Federal Policy Supports the Alternative Standard of H.R. 4312

In 1990 Congress enacted the Native American Languages Act (NALA), which established the federal policy of "preserv[ing], protect[ing], and promot[ing] the rights and freedom of Native Americans to use, practice, and develop Native American languages."[76] The NALA is the first and only federal law which guarantees the right of a language minority group to use its language in "public proceedings."[77] Disenfranchising Native Americans by failing to provide language assistance in the electoral process to those who need it would surely violate this statutory right.

We believe that in addition to providing a legislative foundation for reauthorizing and amending §203, the NALA actually requires it as a function of the federal trust responsibility for Native Americans. In the NALA, Congress undertook the responsibility to protect and preserve Native American languages as functions of culture, as shown in its findings:

> (1) the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages;

---

[76] 25 U.S.C. §2901, 2903 (1991 supp.)

[77] *Id.* at §2904. Congress declared that the "right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding."

> (2) special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities;
>
> (3) the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values;
>
> . . .
>
> (8) acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans.[78]

The U.S. Supreme Court has upheld legislation treating Native Americans differently from others if it fulfills the federal trust responsibility.[79] Amending §203 to add an alternative standard for Native Americans fulfills the trust obligation to protect native languages as well as rights of Native Americans to use their languages in public proceedings.

The NALA represents part of a growing trend to recognize, protect, and appreciate the uniqueness and diversity of Native American cultures and languages. Last fall Senator Inouye introduced S. 2044, a bill which would implement the NALA by establishing a grant program to "assure the survival and continuing vitality of Native American languages." The Senate passed a similar bill for Alaska Natives in November 1991 (S. 1595) which is designed to "preserve and enhance the ability of Alaska Natives to speak and understand their native languages."

---

[78] Id. at §2901 (emphasis added).

[79] Morton v. Mancari, 417 U.S. 535 (1974).

In addition, President Bush recently signed legislation declaring 1992 the "Year of the American Indian," in recognition of the many contributions Native Americans made to society.[80] This legislation notes that "American Indian governments developed the fundamental principles of freedom of speech and the separation of powers in government, and these principles form the foundation of the United States Government today." It would be ironic indeed if Congress, by failing to reauthorize and amend §203, disenfranchised the same segment of society which developed our fundamental philosophy of government.

Congress and the President are not alone in recognizing the special value of Native American cultures and languages. US ENGLISH, one of the most vocal supporters of the English-only movement in the United States today, makes an exception to its strict pro-English stance for Native American languages. Its 1986 policy on Native American languages states:

> The languages of Native Americans are *part of the heritage of the North American Continent*. While we are opposed to the official institutionalization of other immigrant languages in competition with English, we recognize *as a matter of justice* that Native Americans should have opportunities to maintain their own languages.
>
> Native American languages are not spoken anywhere else in the world, and some would surely disappear without affirmative encouragement. This would be *a loss to all humankind*, and not just the affected tribes. We believe that *the preservation of Native American languages is an intellectual obligation we must assume*.[81]

---

[80] P.L. 102-188, 105 Stat. 1286 (1991).

[81] US ENGLISH Policy Position: Native American Languages (July 11, 1986) (emphasis added).

Finally, Native Americans themselves strongly support the use of their native languages as a matter of cultural survival. Despite the destructive effects of European contact on Native American languages and cultures, many tribes use their languages on a daily basis. For some tribes, such as the Navajo, the Pasqua Yaqui, and the Tohono O'odham Nation, the native language is the official language of tribal government. These and other tribes have adopted formal tribal language policies emphasizing the importance of their native tongues.

To many Native Americans, language is more than a means of communication. It represents cultural survival. As the Tohono O'odham language policy so clearly explains, language is inextricably linked to the Tohono O'odham *himdag*, or way of life, which is defined to include "culture, heritage, history, values, traditions, customs, beliefs, and language." In the Tohono O'odham view, it is "a gift from our Creator . . . . It is what makes us Tohono O'odham."

Culture and language evolve simultaneously. Without native languages, concepts that are uniquely Native American cannot be expressed and will eventually be forgotten. As US ENGLISH noted, "[t]his would be a loss to all humankind."

Legislation reauthorizing and amending §203 in accordance with H.R. 4312 should be enacted to protect the fundamental rights of a disenfranchised, disempowered group to participate fully in the government it helped create. It should be passed to fulfill the federal trust responsibility to protect the rights of Native Americans to use their languages in public proceedings. But most importantly, legislation like H.R. 4312 should be enacted because it acknowledges the fundamental right of Native Americans to exist as a distinct yet integral part of American society.

* * * *

Office of the Governor

Telephone
(505) 869-3111
(505) 869-6333
Fax (505) 869-4236

PUEBLO of ISLETA
P.O. Box 1270
Isleta, New Mexico 87022

RESOLUTION NO. 91-57

WHEREAS, the Pueblo of Isleta is a duly recognized sovereign tribal government consisting of the Tribal Council and the Governor; and,

WHEREAS, Section 203 of the Federal Voting Rights Act will expire in August, 1992 if not reauthorized by Congress; and,

WHEREAS, Section 203 requires that language assistance be given in Native American languages by certain counties in the electoral process; and,

WHEREAS, 203 does not currently require the counties on the Isleta Reservation to provide language assistance, but should because it would enable many Indian language speakers to effectively participate in the democratic process; and,

WHEREAS, the current coverage formula in 203 uses county rather than reservation boundaries in assessing whether a county must provide language assistance to Indian language speakers, and because of this, fails to identify many citizens who could benefit from assistance; and,

WHEREAS, the right to vote is a fundamental constitutional right of all American citizens which cannot be abridged, regardless of which language they speak; and,

WHEREAS, Congress recently declared in the Native American languages Act of 1990 that "the right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding";

NOW, THEREFORE BE IT RESOLVED that the Pueblo of Isleta supports the reauthorization of 203;

Page Two
Resolution No. 91-___

BE IT FURTHER RESOLVED that the Pueblo of Isleta supports the amendment of 203 to provide an alternative method of identifying Indian language speakers such that the operative unit shall be reservations or their equivalent instead of counties where counties contain Indian lands.

CERTIFICATION

I, the undersigned as Governor of the Pueblo of Isleta, do hereby certify that the foregoing resolution was passed at a duly called meeting of the Isleta Tribal Council held on the 3rd day of DECEMBER, 1991, at which a quorum was present with 9 voting for, -0- opposing and -0- abstaining said resolution.

For Governor Alex Lucero

ATTEST:

Marie Velarde
Marie Velardez, Tribal Secretary

Joe P. Anzara Vice President
President Verna J. Williamson

RESOLUTION OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL

(Supporting the Reauthorization of Section 203 of the Federal Voting Rights Act & Authorizing the Native American Rights Fund to provide Testimony on behalf of the Tohono O'odham Nation)

RESOLUTION NO. 92-053

WHEREAS, *the Tohono O'odham Nation is a federally recognized tribe; and*

WHEREAS, *Section 203 of the federal Voting Rights Act will expire in August 1992 if not reauthorized by Congress; and*

WHEREAS, *Section 203 requires that language assistance be given in Native American languages by certain counties in the electoral process; and*

WHEREAS, *the Tohono O'Odham Nation is located in three (3) Counties in the State of Arizona, namely, Pima, Pinal and Maricopa; and*

WHEREAS, *Section 203 does not currently require all counties on the Tohono O'Odham Nation to provide language assistance, but should because it would benefit many Indian language speakers; and*

WHEREAS, *the current coverage formula in §203 uses county voting age population as a standard of comparison rather than the reservation's Native American voting age population in assessing whether a county must provide language assistance to Indian language speakers, and because of this, fails to identify many citizens who could benefit from assistance; and*

WHEREAS, *the right to vote is a fundamental constitutional right of all*

RESOLUTION NO. 92-053
(Supporting the Reauthorization of Section 203 of the Federal Voting Rights Act & Authorizing the Native American Rights Fund to provide Testimony on behalf of the Tohono O'odham Nation)
Page (2)

American citizens which cannot be abridged, regardless of which language they speak; and

WHEREAS, Congress recently declared in the Native American Languages Act of 1990 that "the right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding".

NOW, THEREFORE, BE IT RESOLVED that the Tohono O'odham Legislative Council supports the reauthorization and amendment of §203 to provide an alternative method of identifying Indian language speakers such that the operative standard of comparison shall be the reservation's voting age Native American population rather than the county voting age population.

BE IT FURTHER RESOLVED that the Tohono O'Odham Legislative Council hereby approves the support of the Native American Rights Fund to provide testimony on behalf of the Tohono O'Odham Nation.

The foregoing Resolution was passed by the Tohono O'Odham Legislative Council on the 6th day of February, 1992 at a meeting at which a quorum was present with a vote of 1,558.0 FOR; -0- AGAINST; -0- NOT VOTING; and 166.0 (04) ABSENT, pursuant to the powers vested in the Council by Section 1 (f) of Article VI of the Constitution of the Tohono O'Odham Nation, adopted by the Tohono O'Odham Nation on January 18, 1986; and approved by the Acting Deputy Assistant Secretary - Indian Affairs (Operations) on March 6, 1986, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

RESOLUTION NO. 92-053
(Supporting the Reauthorization of Section 203 of the Federal Voting Rights Act & Authorizing the Native American Rights Fund to provide Testimony on behalf of the Tohono O'odham Nation)
Page (3)

TOHONO O'ODHAM LEGISLATIVE COUNCIL

Mary Ann Antone
Mary Ann Antone, Legislative Chairwoman

10th ***day of*** February ***, 19***92

ATTEST:

Teresa M. Choyguha, Legislative Secretary

10th ***day of*** February ***, 19***92.

Said Resolution was submitted for approval to the office of the Chairman of the Tohono O'Odham Nation on the 10th ***day of*** February ***, 19***92 ***at*** 11:18 ***o'clock,*** a ***.M., pursuant to the provisions of Section 5 of Article VII of the Constitution and will become effective upon his approval or upon his failure to either approve or disapprove it within 48 hours of submittal.***

TOHONO O'ODHAM LEGISLATIVE COUNCIL

Mary Ann Antone
Mary Ann Antone, Legislative Chairwoman

☒ ***APPROVED*** ***on the*** 10 ***day of*** February ***, 19***92

☐ ***DISAPPROVED)*** ***at*** 2:29 ***o'clock,*** P ***.M.***

JOSIAH MOORE, Chairman
TOHONO O'ODHAM NATION

RESOLUTION NO. 92-053
(Supporting the Reauthorization of Section 203 of the Federal Voting Rights Act & Authorizing the Native American Rights Fund to provide Testimony on behalf of the Tohono O'odham Nation)
Page (4)

Returned to the Legislative Secretary on the 11th *day of* February*,*
*19*92*, at* 11:50 *o'clock,* A*.M.*

Teresa M. Choyguha
Teresa M. Choyguha, Legislative Secretary

RESOLUTION NUMBER 4527-09-91 OF THE DULY ELECTED AND CERTIFIED GOVERNING BODY OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA

WHEREAS, the Turtle Mountain Band of Chippewa Indians, hereinafter referred to as the Tribe, is an unincorporated Band of Indians acting under a revised Constitution and By-laws approved by the Secretary of the Interior on June 16, 1959, and amendments thereto approved April 26, 1962 and April 03, 1975; and

WHEREAS, Article IX (a) Section 1 of the Turtle Mountain Constitution and By-laws empowers the Tribal Council with the authority to represent the Band and to negotiate with the Federal, State and local governments and with private persons; and

WHEREAS, Section 203 of the federal Voting Rights Act is due to expire next year; and

WHEREAS, this may be important to the members of the Turtle Mountain Band of Chippewa because Section 203 requires certain counties to supply interpreters or other types of language assistance to voters who speak American Indian languages; and

WHEREAS, federal law requires this language assistance to insure that all citizens, no matter which language they speak, may exercise their constitutional right to vote; and

WHEREAS, Rolette County is currently required by Section 203 to provide language assistance to your tribal members throughout the voting process--from voters registration to actual voting at the polls; and

WHEREAS, if Section 203 is allowed to expire, Rolette County will no longer have to provide language assistance; and the Department of Justice will no longer be responsible for prosecuting state and county violations of Section 203; and

WHEREAS, the Native American Rights Fund has been involved in this legislation; and

WHEREAS, the Tribe wishes to support the extention of Section 203; now

THEREFORE BE IT RESOLVED that the Tribe go on record in support of extending Section 203 of the Federal Voting Rights Act.

CERTIFICATION

I, the undersigned Tribal Secretary of the Turtle Mountain Band of Chippewa Indians, do hereby certify that the Tribal Council is composed of nine (9) members of whom ***six (6)*** constituting a quorum were present at a meeting duly called, convened, and held on the ***19th day of September, 1991,*** that the foregoing resolution was adopted by an affirmative vote of ***five (5) in favor;*** with the Chairperson not voting.

Jolean Peltier
Jolean Peltier, Tribal Secretary

CONCURRED:

Twila Martin Kekahbah
Twila Martin-Kekahbah, Tribal Chairperson

NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION

Marilyn Go, Chair
Voting Rights Committee
Baden Kramer Huffman Brodsky & Go, P.C.
20 Broad Street
New York, New York 10005
Tel (212) 363-7020
Fax (212) 797-3389

April 14, 1992

STATEMENT OF THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION REGARDING REAUTHORIZATION OF SECTION 203 OF THE VOTING RIGHTS ACT

The Honorable Don Edwards, Chair
Subcommittee on Civil and
Constitutional Rights
U.S. House Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

The National Asian Pacific American Bar Association ("NAPABA") urges support of reauthorization of Section 203 of the Voting Rights Act as specifically set forth in H.R. 4312, the Voting Rights Improvements Act of 1992, introduced by Representative Jose Serrano (D-NY).

NAPABA is the national organization of Asian Pacific American attorneys, with thousands of members throughout the county. NAPABA represents the professional concerns of its members and promotes the interests of the Asian Pacific American community. In addressing the legal needs of Asian Pacific Americans, NAPABA has, among other activities, focused upon the voting rights of Asian Americans, since the right to vote is unquestionably one of the fundamental rights we have as American citizens. We have worked with other Asian American organizations in evaluating the need for reauthorization of Section 203 and endorse the statements submitted to the Subcommittee by the Asian American Legal Defense and Education Fund ("AALDEF"), the Chinese Americans Citizen Alliance, the Japanese American Citizens League and the Organization of Chinese Americans.

The Asian American population has doubled over the past decade and is the fastest-growing minority group in the country. This growth is due, in large part, to the reduction of discriminatory quotas and other barriers to immigration previously confronted by Asians. As a result, a large percentage of the Asian American community is foreign born, many of whom have limited English speaking proficiency. Since the languages of Asian minority groups (unlike the languages of most other immigrant groups) share no common roots with English, native speakers of Asian languages have considerable problems learning English. In many states, voter initiatives and referendums have become so complicated that even lawyers have a difficult time understanding them. They can be impossible to understand or, at a minimum, intimidating to citizens with limited English proficiency.

Nonetheless, Asian immigrants have embraced the opportunity for American citizenship and, as data from the Immigration and Naturalization Service indicate, become citizens in far larger numbers and at a faster rate than other minority groups. See also, study of the National Association of Latin American Officials. Thus Asian Americans may constitute the fastest growing group of eligible voters.

With the passage of the Immigration Reform Act of 1990, which emphasizes family reunification and technical skills, the number of Asian immigrants will most likely increase at an even faster rate in the future, and a large number of these immigrants will continue to have limited English ability. The availability of affordable English instruction is limited even now for Asian language speakers. Needless to say, the lack of proficiency in English will continue to deter many eligible Asian American voters from exercising their right to vote. Studies conducted by AALDEF and other Asian American groups have clearly shown that a large percentage of Asian Americans will be more likely to vote if bilingual ballots were used. Thus passage of H.R. 4312 is critical to encouraging Asian Americans to vote.

Besides reauthorization of Section 203, H.R. 4312 is important because of the alternative benchmark it will establish for triggering the requirement for bilingual voter assistance. The problem H.R. 4312 addresses is simply whether 10,000 voters in a county should not be deprived of their right to vote simply because of language difficulties. NAPABA is of the view that the 10,000 benchmark is a reasonable one, particularly when the benefits of facilitating the right to vote of 10,000 voters are weighed against the costs of administration.

Having made the policy decision to provide Asians with the opportunity to become U.S. citizens, Congress should now act to insure that Asian Americans will be able to exercise their rights as citizens to vote. Just as Congress resoundingly struck down the barrier to voting posed by poll taxes, it should now insure that additional barrier posed by language proficiency shall not remain.

Very truly yours,

Marilyn Go

MG/em

STATEMENT OF

PRINCIPAL CHIEF WILMA P. MANKILLER
OF THE
CHEROKEE NATION OF OKLAHOMA

FOR THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

HOUSE COMMITTEE ON THE JUDICIARY

HEARING ON

H.R. 4312, THE VOTING RIGHTS ACT AMENDMENTS

APRIL 1, 1992

Mr. Chairman, as Principal Chief of the Cherokee Nation of Oklahoma, I present this testimony on behalf of the 125,000 tribal members of the Cherokee Nation who appreciate and will benefit from the proposed Voting Rights Act Reauthorization and Amendments, H.R. 4312. We congratulate you on your dedication to this important legislation and thank you deeply for including new language relating to the Act's coverage of Native Americans on Indian lands.

THE CHEROKEE NATION OF OKLAHOMA

The Cherokee Nation of Oklahoma is the second largest Indian tribe in the Nation. Our government-to-government relationship with the United States extends back to 1785, and was reaffirmed in July, 1990 when the U.S. executed a Self-Governance Compact with the Cherokee Nation.

The Cherokee Nation provides programs and services to all tribal members and other eligible Indians who live within our 14-county jurisdictional service area in Northeast Oklahoma. Our members actively participate in tribal elections as well as in federal, state and local elections.

The Cherokee Nation has always prided itself on its traditions of literacy and democracy, the two concepts that inspired the language assistance provisions of the Voting Rights Act. In order to demonstrate why it is so important to us that the language assistance provisions of the Voting Rights Act be reauthorized and amended so as to cover as many members of the Cherokee Nation as possible, let me recite some of our accomplishments in these two areas.

CHEROKEE LEADERSHIP IN LITERACY AND DEMOCRACY

The Cherokee Nation has long been at the forefront of promoting literacy and democracy among Indian and non-Indian peoples of the United States.

The Cherokee Nation was a pioneer in Indian education, establishing some of the earliest institutions of pre- and post-secondary learning in the Western territory. A most remarkable Cherokee achievement was by our famous Sequoyah, who did not read or write English, but invented the 86-character Cherokee syllabary by 1821. Six years later the Cherokee Nation was publishing its own bilingual newspaper and making great strides against illiteracy. The Cherokees eventually achieved a 90% literacy rate. From 1841 until 1903 the Cherokee Nation established and operated America's first free, compulsory co-educational public school system. Our schools taught Cherokee children to read and write in both English and the Cherokee language, an accomplishment far beyond that achieved by non-Indians in the English language.

Early in its history, our tribe also established a system of government based on elections and universal suffrage. In 1827, the Cherokee Nation ratified a written constitution, still in effect today, which established an electoral process similar to that used in local, state, and federal elections in the United States.

Disaster befell the Five Civilized Tribes of Oklahoma, including the Cherokee Nation, and many other tribes in the early 1900s as the federal government tried to eliminate all vestiges of tribes' governmental structures, educational systems and Indian languages and cultures. These federal actions dessimated Indian educational systems. Presently, 56% of all Cherokee adults never were able to earn a high school diploma, and 33% have not achieved more than an 8th grade education. Also during this period, tribal governance was effectively dissolved. For the Five Civilized Tribes of Oklahoma, for example, the U.S. President began appointing the tribal leaders of the Tribes rather than allowing them to be popularly elected.

Gradually, tribes have revitalized. In 1970, the Congress restored popular selection of leadership by the Five Civilized Tribes. Since then, Cherokee Nation elections for Principal and Deputy Chief and 15 Tribal Council members have been held every four years.

It has taken us many years to emerge from the decline occasioned by our treatment at the hands of the United States Government at the turn of this century. To this day, we see as our greatest challenges our struggle for self-governance and the promotion of literacy in both English and Indian languages. For these and other reasons, it is fitting that the Congress reauthorize and strengthen the language assistance provisions of the Voting Rights Act in 1992 -- the 500th Anniversary Year of the First Americans.

CHEROKEE SUPPORT FOR AMENDMENTS TO THE VOTING RIGHTS ACT

Nature of Act Proposed Amendment

The Voting Rights Act and its language assistance provisions provided for oral assistance and publicity for most Native American language speakers from 1976, when Section 203 was first enacted, until 1982. As Cherokee is one of the few written Indian languages, a greater degree of voter assistance was available during this period to our monolingual and bilingual voters. In 1982, however, alteration of the coverage formula of Section 203 resulted -- we believe unintentionally -- in loss of Indian language assistance in some 80 percent of the counties nationwide which had been previously required to provide such assistance. Consequently 24 of 25 counties in Oklahoma ceased to be covered by the language assistance requirement. Of the 14 counties in the Cherokee Nation's jurisdictional service area, only Adair County remains eligible for language assistance for Indian voters -- even though thousands of Cherokees in the other 13 counties badly need the help.

The current coverage formula in Section 203, which uses counties as the operative jurisdiction for language assistance coverage, is very harmful to Native American voter populations. It subdivides many tribes' reservations or jurisdictional areas, thereby diluting substantially the concentration of Indian voters in the tribe as a whole. For example, Kenwood Community, which is almost entirely composed of full-blood, Cherokee-speaking residents, is divided down the middle by a county line. Half of Kenwood Community residents technically live in Mayes County, while the other half reside in Delaware County. Cherokees there naturally do not think of themselves as Mayes or Delaware residents. They are Cherokee citizens and Kenwood Community residents.

When the more widely dispersed Indian voters are combined with the greater numbers of non-Indian voters in a given county, the usual result is that Indians constitute less than 5 percent of the county's total population. Therefore, those Indian voters lose the right to receive language voting assistance without any regard whatsoever to their actual need for such assistance.

With regard to the Cherokee Nation alone, the fact that only one Oklahoma County is covered under the current coverage formula leaves 15,000 people without assistance merely because a county line separates them from other tribal members. When other tribes are added in, the number multiplies. The new coverage formula proposed in H.R. 4312 would help ensure that every Native American who wants to cast an informed vote in federal elections will be able to do so.

Cherokee Need for the Amendments

The Cherokee Nation strongly believes that Native American language constitutes an integral part of our culture and our daily lives. Congress underscored this belief last year when it enacted the Native American Languages Act, guaranteeing our right to use the Cherokee language when conducting tribal business. Of our more than 60,000 tribal members who reside on or near tribal lands in Northeastern Oklahoma, almost 20,000 speak the Cherokee language. Most live in small isolated communities or enclaves such as Kenwood, Bull Hollow, Oaks, Belfonte, and Flute Springs. When tribal teachers took adult literacy students from Belfonte (Sequoyah County) to the Oklahoma State Capitol last year, most of these adults rode on an elevator and saw an airport for the first time in their lives.

Within communities like Belfonte, we cannot hold tribal meetings without use of the Cherokee language because too many adults cannot understand English adequately. Young Cherokee speakers also experience language difficultites. Consequently, bilingual education programs in the county school systems have proliferated. For example, two years ago the City of Tahlequah in Cherokee County initiated a high school bilingual education program to assist Cherokee students entering from rural K-8 schools in the county.

Without the proposed amendment to Section 203, there are voters in Belafonte, Kenwood, Oaks, Marble City and many other communities across our 14-county jurisdictional area who will not be able to cast an informed vote.

Widespread participation in the electoral process is the key to increased Indian well-being. Recent history demonstrates a trend of greater participation by Native Americans in the democratic processes of the United States Government. The Cherokee Nation hopes to see this trend continue, for it has not yet gone far enough. The language assistance provisions of H.R. 4312 are crucial to the continuation of this healthy trend.

The Language & Culture Committee of the Cherokee Nation, which is composed of 13 of the 15 members of the Tribal Council, recently voted unanimously to adopt a resolution supporting the provision in H.R. 4312 that would amend Section 203 to implement an alternative method of identifying Indian language speakers. The method would utilize a tribe's voting age population as the operative standard rather than the county's voting age population. The Resolution was approved by the entire Tribal Council in formal session on March 13.

The Tribal Council's Resolution recites that there are numerous Cherokee communities among the counties in which the Cherokee language is extensive or predominant, although Adair County is presently the only one of 14 counties within the Cherokee Nation which qualifies for bilingual assistance under the Voting Rights Act. The Resolution notes that Indian tribes are not confined to or defined by state or county boundaries, and that the sovereign Cherokee Nation has the right through treaties, Congressional Acts and court decisions to be dealt with separately from state, county and other jurisdictions. The Resolution adds that the basic rights of tribal members to use the Cherokee language are further supported by the Native American Languages Act recently enacted by the Congress. I have enclosed a copy of our Resolution with this statement.

CONCLUSION

Mr. Chairman, thank you for this opportunity to present the views of the Cherokee Nation. I hope you will give our thoughts and recommendations your careful attention as you prepare to reauthorize and amend what has been called the most important piece of civil rights legislation ever.

STATEMENT Of
RAUL YZAGUIRRE
PRESIDENT
NATIONAL COUNCIL OF LA RAZA

I. INTRODUCTION

My name is Raul Yzaguirre and I am the President of the National Council of La Raza (NCLR). I would like to thank Chairman Don Edwards of the House Judiciary Subcommittee on Civil and Constitutional Rights for accepting this statement made on behalf of NCLR in support of the extension and improvement of Section 203 of the Voting Rights Act of 1965, specifically through the passage of H.R. 4312, the Voting Rights Improvement Act of 1992 or similar legislation. I ask that this statement be made a part of the written record of the Subcommittee's hearings of April 1, 2, and 8, 1992.

NCLR is a Washington, D.C.-based national organization that exists to improve life opportunities for Americans of Hispanic descent. A nonprofit, tax-exempt organization incorporated in Arizona in 1968, NCLR is the nation's largest constituency-based Hispanic civil rights organization. It serves as an advocate for Hispanic Americans and as a national umbrella organization for 142 formal "affiliates," community-based organizations that serve Hispanics. Through its affiliate network, NCLR annually serves more than two million Hispanics in 35 states, the District of Columbia, and Puerto Rico.

I offer NCLR's strong support for and recommendation of H.R. 4312, the Voting Rights Improvement Act of 1992, which would reauthorize Section 203 of the Voting Rights Act of 1965 until the year 2007, and which improves Section 203 by providing two alternative standards of coverage.

NCLR believes Section 203, the only temporary provision of the three bilingual assistance provisions of the Voting Rights Act, should be extended for three related reasons. First, bilingual voting assistance is still needed because many Hispanic, Asian American, and Native American (which refers to both American Indians and Alaskan Natives) voting-age citizens still suffer from the effects of the discriminatory treatment, specifically the inequitable education conditions, that originally gave rise to the need for this assistance. In fact, many of those conditions still exist today. Second, language assistance in voting has been very successful in achieving the goal of Section 203, which is the encouragement and enabling of language minorities to participate effectively in the electoral process. Finally, language assistance is sound public policy because it works to include, rather than exclude, language-minority citizens in the most fundamental aspect of our participatory government.

Moreover, NCLR believes that the improvements to Section 203 made by H.R. 4312 in its current form are needed to carry out fully Congress's original intent for this provision.

Due to unanticipated demographic changes in the target populations, Section 203's original coverage formula is no longer adequate and should be adjusted to better reflect the reality of today's protected language-minority communities. H.R. 4312 accomplishes this goal with its two proposed alternative coverage standards -- the numerical benchmark and the special Native American provision. With the numerical benchmark, the bill remedies the problem that the current Section 203 percentage formula poses for many Hispanic and Asian American voters with limited English skills who live in major metropolitan areas with extremely large general populations. H.R. 4312 also provides a new and more appropriate coverage standard for the Native American limited-English-proficient voting citizens living on federally designated reservations or their equivalent. NCLR, therefore, urges the Subcommittee to incorporate all of the provisions H.R. 4312 in the bill it will report out after its consideration of Section 203 and other issues related to the Voting Rights Act of 1965.

II. CONTINUING NEED FOR LANGUAGE ASSISTANCE IN VOTING

Congress originally added Section 203 and the two other language assistance provisions to the Voting Rights Act in 1975 for the purpose of providing limited-English-proficient (LEP) voting-age citizens the language assistance necessary to allow them to exercise their right to vote in an informed and effective manner. The inclusion of the new language assistance provisions was supported by Congressional findings that certain language-minority citizens had been systematically denied their right to vote due to pervasive discrimination, manifested through exclusionary voting procedures (e.g., English-only elections and literacy tests) and unequal educational opportunities.

Congress found that four language-minority groups -- Hispanics (or those of "Spanish heritage," as the statute reads), Asian Americans, American Indians, and Alaskan Natives -- have been historically discriminated against and effectively excluded from participation in the electoral process because of language. While other immigrant groups with native languages other than English have also settled in this country, Congress did not find that such groups suffered similar widespread and continuing discrimination with regard to voting. It is for these reasons that only the four language-minority groups described above are covered by Section 203.

Demographic trends, together with the continuing existence and lasting effects of discriminatory practices (i.e., inequitable educational opportunities), indicate that significant numbers of language-minority voters may still be denied full political participation and, therefore, still need language assistance. Recent figures show that 40 million Americans speak languages other than English in their homes. The protected language-minority communities, the intended beneficiaries of Section 203, have grown dramatically during the past decade. Although many ethnic-minority Americans are English-proficient, many others are not. The 1990 Census data show that the nation's Hispanic population has increased by 53% since 1980 and now makes up 9% of the total population. The U.S. Asian/Pacific Islander population rose by 107.8% to compose 2.9% of the total population; and individuals identified as American Indian, Eskimo, or Aleut jumped 37.9% and are now 0.8% of the total population.

While these language-minority communities have grown, they continue to face formidable barriers to full and equitable participation in the political/electoral process. In 1975, Congress found that the unequal educational opportunities often confronted by many language-minority citizens had resulted in high illiteracy rates and low voter participation. Considering these factors, English-only elections and voting practices (including registration) effectively excluded many language-minority citizens from participation in the electoral process. In 1992, language minorities, particularly Hispanics and Native Americans, continue to suffer stark educational disadvantages on a widespread basis. Moreover, significant portions of these communities remain limited-English-proficient and need special instruction to help them learn English. For example, it is estimated that more than eight million school-age children currently speak languages other than English.

NCLR's research shows that the Hispanic community still suffers from many of the conditions that supported the earlier Congressional findings of inequitable educational opportunities leading to high illiteracy and low voter participation rates. For Hispanics, these unequal educational opportunities stem from factors such as inequitable school finance systems and the highest levels of school segregation. As reported in NCLR's recent report, *State of Hispanic America 1991: An Overview*, some examples of educational inequities with which Hispanics must still contend are:

- Disproportionately low participation in federal educational initiatives such as Head Start, Chapter 1 (education block grant funds for students from disadvantaged families), and TRIO (Special Programs for Students from Disadvantaged Backgrounds).

- Extremely low numbers of Hispanic teachers, who are more likely to be sensitive to the special needs of Hispanic students and parents, particularly where language is an issue. As of 1988, only 2.9% of public school teachers and 2.8% of private school teachers in elementary and secondary schools were Hispanic.

- Greater likelihood that Hispanic children will be held back in school compared to White or Black children, which is significant because early school failure is the greatest predictor of a child's later dropping out of school.

- Far greater likelihood that Hispanic children will attend segregated schools within big-city school systems (which have limited tax bases resulting in limited resources), making Hispanics the most educationally segregated minority group.

As a result of these and other persistent educational inequities:

- In 1991, only 51.3% of Hispanics 25 years old and over were high school graduates, compared to 80.5% of non-Hispanics.
- In 1989, approximately 37.7% of Hispanics aged 18-24 years were high school dropouts, compared to 16.4% of Blacks and 14.1% of Whites.
- In 1988, 12.2% of Hispanics 25 and older met the traditional measure of illiteracy -- failure to complete five years of schooling -- compared to 2.0% of Whites and 4.8% of Blacks in the same age group.

Additionally, the Immigration Reform and Control Act of 1986 (IRCA) resulted in the legalization of over three million people, approximately 85% of whom are Hispanic. Those who became legal residents under IRCA will soon satisfy the residency requirements for naturalization and citizenship. Much of that population will then be eligible to vote and many will need language assistance. Although rudimentary English skills are required to pass the citizenship test, it does not necessarily follow that the same level of skill would be adequate to participate effectively in the increasingly complex electoral process. Today, ballot initiatives, more often than not, involve intricate public finance propositions and convoluted constitutional issues, all of which are far more complex than the simple sentence format of citizenship or naturalization tests.

Illiteracy and undereducation are clearly still major problems for the Hispanic community. Those within the community who are most at risk for these conditions are its limited-English-proficient members. Considering the bleak educational conditions facing this significant portion of the Hispanic voting population and its continuing growth, the need for the bilingual voting assistance provided by Section 203 remains as great as or greater than ever.

III. SUCCESS OF BILINGUAL VOTING ASSISTANCE

Bilingual assistance in voting has been a significant success for the Hispanic community. Section 203 of the Voting Rights Act, together with the Act's two other language assistance provisions, 4(f)(4) and 4(e), are largely responsible for making the electoral process accessible to many limited-English-proficient Hispanic citizens. These Hispanic voters often do not feel completely comfortable using English when exercising their treasured right to vote; without the help of special language assistance, they would effectively be disenfranchised.

Perhaps the best indications of the success of bilingual voting assistance are that voter registration and participation rates in language-minority communities continue to rise and that the number of elected officials of language-minority backgrounds continues to grow. The Hispanic community alone has witnessed a steady increase in voter registration and turnout since 1976. The number of Hispanics registered to vote in the Southwest (Arizona, California, Colorado, New Mexico, and Texas) *doubled* from 1976 to 1988 -- from 1,512,300 to 3,003,400. The number increased a dramatic 125% in Texas alone during that period. The number of Hispanics who turned out to vote also increased during the same period -- from 1,016,000 to 1,634,350 in the five Southwestern states listed above. The number of Hispanic elected officials also continues to increase significantly. In 1973, 1,379 Hispanics held office; by 1991, the figure had climbed to 4,202. These factors indicate that, by removing language barriers, bilingual voting assistance helps integrate language-minority citizens into the electoral process.

The positive effects of language assistance in voting are perhaps best illustrated in the state of New Mexico, where bilingual voting assistance has been available almost continuously since statehood. New Mexico has the largest proportion of Hispanics of any state and it has traditionally had the largest proportion of Hispanics elected to offices at every level. The positive effects of bilingual voting assistance in New Mexico present a stark contrast to other states with similarly large concentrations of Hispanics, but within which Hispanics are grossly underrepresented in elected offices compared to their proportion of the population.

Furthermore, recent information suggests that bilingual voting assistance remains cost effective. The Government Accounting Office (GAO) presented an in-depth statistical analysis of the costs of this assistance in its 1986 report, *BILINGUAL VOTING ASSISTANCE: Costs of and Use During the November 1984 General Election*. The report indicates that in 83 of the 295 responding jurisdictions the average cost of providing written assistance was 7.6% of total election expenditures and an estimated 18 states incurred *no* additional costs in providing assistance. The GAO report showed oral language assistance to be even less burdensome. The GAO estimated that 79% of the 259 responding jurisdictions that provided oral assistance incurred *no* costs. For another 39 jurisdictions, oral assistance amounted to only 2.8% of total expenditures.

The bilingual assistance mandated by Section 203, then, has helped in furthering the goal of the statute -- to bring minority voters into the electoral process. An added plus is that the service has been effective without becoming a financial burden for those jurisdictions required to provide it.

IV. BILINGUAL VOTING ASSISTANCE IS SOUND PUBLIC POLICY

NCLR acknowledges the importance of English as the common language in American society. The great majority of the limited-English-proficient portion of the Hispanic community is composed of the Hispanic elderly (who are the most likely to be Spanish monolingual), those with low educational attainment, and those with low incomes. These people constitute the most vulnerable segment of the Hispanic population, having the least access to services and opportunities that would draw them into mainstream American society and assist in their acquisition of better English skills.

There is ample reason to believe, however, that most limited-English-proficient Hispanics in the United States not only want to, but also will eventually, learn English. National studies of language acquisition among Hispanics indicate that the majority of Hispanic immigrants begin to learn and use English rapidly. Hispanics from immigrant families typically have the same English acquisition patterns of other immigrant groups and lose their Spanish fluency over several generations. While most Hispanic immigrants continue to speak Spanish throughout their lives, most of those who arrive in the U.S. before the age of 14 often use English as their preferred everyday language outside the home. The children of Hispanic immigrants usually speak Spanish as a second language; the grandchildren of immigrants have English as their first and primary language and often do not speak Spanish regularly, if at all.

According to Calvin Veltman in his study of U.S. Hispanics' acquisition of English, *The Future of the Spanish Language in the United States*, 70% of immigrants appear to abandon the exclusive use of Spanish within a 10-year period, and 75% of Hispanic immigrants are speaking English on a regular daily basis by the time they have been in the U.S. for 15 years. These statistics are particularly significant when considered in light of the fact that nearly three-fourths of Hispanics either are native-born Americans or have been in the U.S. for at least 15 years. (It is important to note that limited-English-proficiency is not just a problem for immigrants; it appears that a large portion, if not a majority, of LEP Hispanic citizens are *native* born.)

The acquisition of a second language, however, cannot be accomplished immediately; it may take a good deal of time. National studies such as the Veltman report support the general premise that providing bilingual services to limited-English-proficient citizens *while* they are trying to learn English actually invites them into the process and enables them to perform the duties of good citizenship. Veltman argues that "[i]solating groups and individuals by denying them communication in a language they can understand slows their integration into mainstream society."

Bilingual voting assistance should, therefore, be understood as a transitional service meant to enable limited-English-proficient citizens to exercise their rights *while* they become more proficient in English. By enabling language-minority voters to cast an informed vote, language assistance gives these voters a vested interest in the American process and makes them feel that they are a real part of it. Considered in this light, bilingual voting assistance can only be seen as positive and sound public policy.

V. NEED FOR ALTERNATIVE STANDARD OF COVERAGE: THE NUMERICAL THRESHOLD

NCLR believes that the current reauthorization process offers an opportunity not only to renew support for language assistance in voting, but also to increase the effectiveness of Section 203 by providing more accurate methods of targeting significant LEP voting populations. While perhaps adequate in theory, in practice Section 203's current coverage formula presents significant problems in making language assistance available to those large LEP voting populations for which it was intended.

It is of great concern to the Hispanic community that, under Section 203's current percentage coverage formula, many numerically large LEP Hispanic voting populations concentrated in major metropolitan areas are not eligible for assistance. Relying solely on the 5% standard means that many jurisdictions with numerically small LEP Hispanic voting populations are covered by Section 203 because the total state/county eligible voting population is numerically small, while other jurisdictions with target populations that are much larger numerically are not covered. This is because the general voting population surrounding the Hispanic LEP voting population is so large that the Hispanic LEP population cannot meet the 5% standard.

Under the current coverage standard, Los Angeles County, California; Cook County, Illinois; Queens County, New York; Philadelphia, Pennsylvania; and Essex County, New Jersey, which together have an estimated total of at least 500,000 LEP Hispanic voters, all fail to meet the 5% standard. These five counties are densely populated major metropolitan areas in which it is virtually impossible for the Hispanic LEP voting populations to meet the 5% margin even though those populations are numerically quite large. Section 203's reliance on a 5% of eligible voting population threshold unnecessarily deprives many large Hispanic LEP voting populations of badly needed assistance, even though they are the intended beneficiaries of the statute.

Similarly, large Asian American communities in California (Los Angeles, San Francisco, and Santa Clara counties) and three New York City counties (Kings, Queens, and New York) are currently not subject to Section 203, but would probably benefit from language assistance in voting. Even with the huge increases in the Asian American population during the last decade, these counties are still not expected to meet the 5% trigger for Section 203 coverage.

Coverage of these major metropolitan areas is of particular concern for the Hispanic community because the majority of Hispanics live in urban areas such as those named a Because of demographic trends in the Hispanic community, it is reasonable to expect that those urban areas of concentration will only grow larger during the coming decade. In describing the current Hispanic population in the United States, NCLR's *State of Hispanic America 1991: An Overview* states that:

- As of March 1991, 91.8% of Hispanics were urban residents, as compared to 72.8% of non-Hispanics.
- Between 1980 and 1990, the Hispanic population grew 53%, with only the Asian/Pacific Islander population growing more rapidly, and it is projected that the Hispanic population will become the largest minority in the United States around the year 2000.

- While the majority of Hispanics are still native-born, approximately half of the growth in the Hispanic population is from natural increase and the other half is from immigration.

Given its current practical effect, Section 203's coverage formula should be adjusted if the intended purpose of the statute -- providing language assistance in voting to large populations in need -- is to be achieved. The best way to improve the effectiveness of Section 203 would be to include, as an alternative to the 5% standard, a numerical threshold as a means of determining coverage.

NCLR cannot calculate with certainty the counties that would definitely be covered under a numerical benchmark standard because the calculation would have to be made using 1990 Census data (from the long form) and the Bureau of the Census will not have those data available until late May 1992 (and then only after a special request from the Senate). NCLR does believe that the projections calculated by the Mexican American Legal Defense and Educational Fund (MALDEF), which are based on ratios developed from 1980 Census data and applied to available general 1990 Census data, are reasonably accurate. These projections indicate that with a 10,000 benchmark, 24 additional counties would be required to provide language assistance in Spanish, and approximately 888,288 additional LEP Hispanic voters would receive badly needed language assistance in voting.

Counties that would almost certainly be covered for Spanish language assistance under a numerical benchmark include Los Angeles County, California; Cook County, Illinois; and Queens County, New York, all of which have extremely large, well-established Hispanic communities that would clearly benefit from Section 203 language assistance. NCLR believes that it is only fair and reasonable to expect that those jurisdictions with the largest concentrations of Hispanics be subject to this federal mandate; and we, therefore, urge the Subcommittee to make such coverage possible. NCLR supports H.R. 4312's inclusion of a coverage standard of 10,000 limited-English-proficient voting-age citizens within each jurisdiction as an alternative to the present 5% standard and urges that any legislation reauthorizing Section 203 also contain such a provision.

Additionally, H.R. 4312's provision of an alternative standard of coverage for Native Americans residing on federally designated reservations addresses the problem that the current formula presents for the Native American population in need. NCLR recognizes that the Native American LEP voting population is severely underserved because coverage is determined by county, rather than the federally designated reservation, or its equivalent, which is where the majority of LEP Native American voters live. NCLR strongly supports the provision in H.R. 4312 of an alternative standard of coverage for Native Americans who reside on reservations and urges its inclusion in the reauthorizing legislation reported by the Subcommittee.

VI. CONCLUSION

NCLR believes that the language assistance in voting authorized by Section 203 is a critical element in the Hispanic community's struggle for fair and equitable participation and representation in the American political process. There is ample evidence to show that this assistance is still needed by language-minority citizens, that it is effective without being burdensome or costly, and that it serves a sound public policy goal. NCLR, therefore, urges the reauthorization of Section 203 with the inclusion of two new alternative coverage standards -- a numerical benchmark of 10,000 and, for Native Americans, the use of federally designated reservations or their equivalent as the basis of comparison.

National Puerto Rican Coalition, Inc.

Louis Nuñez
President

Board of Directors

Officers

Chairperson
Domingo Garcia
Ibero American Action League, Inc
Rochester, NY

Vice Chairperson
Amalia V. Betanzos
Wildcat Services Corporation
New York, NY

Treasurer
Lillian Escobar Haskins
Harrisburg, PA

Secretary
Maria E. Girone
Puerto Rican Family Institute, Inc
New York, NY

Individual Members

Anna Carbonell
Staten Island, NY

The Most Reverend Alvaro Corrada
del Rio, S.J.
Silver Spring, MD

Olga Jimenez Wagenheim
Maplewood, NJ

Reynaldo P. Maduro
Arlington, VA

Frank Marin
Uniondale, NY

Martin Martinez
Rahway, NJ

Eric Munoz, MD
Newark, NJ

Carlos Pinero
New York, NY

Migdalia Rivera
Chicago, IL

Damaso Seda
New York, NY

Christine Torres Matrullo
Philadelphia, PA

Magdalena Torres
Lynbrook, NY

Edwin Vargas, Jr.
Hartford, CT

Jose J. Villamil
San Juan, PR

Organizational Members

Lydia Valencia
Congreso Boricua de N.J., Inc
Trenton, NJ

Carmen Bolden
Congreso de Latinos Unidos, Inc
Philadelphia, PA

Eduardo Gautier
Circulo de Puerto Rico
Indian Head, MD

Jose Quiles
Hispanic Association Higher
Education (HAHE)
Union, NJ

Hipolito Roldan
Hispanic Housing Development Corporation
Chicago, IL

Clara Garcia
Inquilinos Boricuas en Accion
Boston, MA

Dr. Jose R. Gonzalez
InterAmerican University of P.R.
San Juan, PR

Ruben Franco
Puerto Rican Legal Defense and
Education Fund
New York, NY

David Aulet
Western Region Puerto Rican Council
San Jose, CA

TESTIMONY OF LOUIS NUNEZ
PRESIDENT, NATIONAL PUERTO RICAN COALITION
SUBMITTED TO THE HOUSE OF REPESENTATIVES SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS ON THE REAUTHORIZATION AND EXTENSION OF THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT

APRIL 2, 1992

Mr. Chairman and distinguished members of the Judiciary Committee, my name is Louis Nuñez and I am President of the National Puerto Rican Coalition, Inc. (NPRC), which represents over 100 Puerto Rican organization nationwide. I welcome this opportunity to address all of you on one of the most fundamental rights afforded to all Americans - the right to vote. All Americans are entitled to vote regardless of their level of English proficiency.

NPRC supports legislation to reauthorize and improve Section 203, the language assistance provisions of the Voting Rights Act. This legislation ensures the most basic of all democratic rights by assuring that all Americans, irrespective of their cultural and linguistic background, can participate in the nation's political process. NPRC

BEST COPY AVAILABLE

commends the leadership of Congressman José Serrano (D-NY) and the other members of the Congressional Hispanic Caucus in introducing H.R. 4312, the "Voting Rights Improvement Act of 1992".

NPRC supports H.R. 4312 which reauthorizes Section 203 of the Voting Rights Act until the year 2007. If not authorized, many limited-English-proficient United States citizens, including Latinos, Native Americans, Asian Americans and Alaskan Natives, would once again be unable to participate in the electoral process. H.R. 4312 includes a provision allowing limited-English-proficient, eligible voters to fully exercise their most precious democratic rights. While H.R. 4312 reauthorizes Section 203 for another fifteen years, it also mandates bilingual registration and voting assistance in counties where at least 10,000 or more than 5% of voting age citizens need bilingual assistance.

The need for language assistance was the basis upon which Congress enacted legislation amending the Voting Rights Act of 1965. Under that law, Section 203 removed discriminatory practices and procedures, that in effect, excluded language minorities from fully participating in the electoral process. As in 1975 and 1982, the Voting Rights Act requires further amending in order to achieve its intended goal: to allow all eligible voters to participate in the electoral process.

H.R. 4312 would ensure that large Puerto Rican/Hispanic communities receive bilingual voting assistance. By stating that a county is covered by the bilingual voting provisions if at least 10,000 voting age citizens need such assistance, eligible Puerto Rican/Hispanic citizens are better covered by Section 203. Under the existing Voting Rights Act, passed by Congress in 1975, bilingual voting assistance is mandated in a county only when 5% of voting age citizens in this area require such assistance. H.R. 4312 would allow counties such as Queens County, New York; Cook County, Illinois and Los Angeles County, California, which do not meet this 5% benchmark but have a large Puerto Rican/Hispanic limited-English-proficient community, to fully participate in the electoral process.

Under the existing law, Section 203 also fails to serve large communities of limited-English-proficient Native Americans. To date, the Voting Rights Act has had little impact on increasing the participation of Native Americans in the political process. This is due largely to using "county" as the designation requirement for a Native American community which needs bilingual voting assistance, rather than "Indian Reservation", which more accurately targets such a community. Although Native Americans comprise less than one percent of the total United States population, a significant number of limited-English-proficient Native Americans, who speak indigenous languages, are in effect denied bilingual voting assistance.

The language assistance provision of the Voting Rights Act goes to the heart of the Puerto Rican community's political empowerment and will have a direct impact on such critical issues as education, housing, employment, economic development and our political integration into the mainstream.

There are 2.7 million United States citizens of Puerto Rican heritage living in the U. S. mainland. Unfortunately, Puerto Ricans have the highest poverty rate of all Latinos and one of the lowest high school completion rates when compared to the general population. H.R. 4312, in its extension of the bilingual voting provisions of the Voting Rights Act, would ensure that limited-English-proficient, voting-age Puerto Ricans could vote on programs to improve their educational and economic status.

NPRC urges the Judiciary Committee to extend the right to vote to all eligible Americans by reauthorizing Section 203 with the improvements included in H.R. 4312, the "Voting Rights Improvement Act".

STATEMENT OF REP. JOHN CONYERS, JR.

MR. CHAIRMAN, ONCE AGAIN THE REAGAN/BUSH CONSERVATIVES ON THE SUPREME COURT HAVE DEMONSTRATED the court IS FUNDAMENTALLY UNSYMPATHETIC TO THE RIGHTS OF MINORITIES, AND HOSTILE TO CONGRESSIONAL INTENT. IN 1983 THE COURT IGNORED CONGRESSIONAL INTENT IN THE *GROVE CITY CASE*, AND WE HAD to OVERTURN THAT DECISION. IN 1989, THE COURT DISREGARDED CLEAR CONGRESSIONAL INTENT AND 18 YEARS OF CLEAR JUDICIAL PRECEDENTS BY CUTTING BACK ON CIVIL RIGHTS PROTECTION IN *WARDS COVE* AND A SERIES OF EMPLOYMENT DISCRIMINATION CASES -- IT TOOK CONGRESS MORE THAN TWO YEARS TO RESTORE THE LAW TO ITS ORIGINAL STRENGTH. JUST LAST MONTH, THE COURT EASED UP ITS ENFORCEMENT OF THE SCHOOL DESEGREGATION ORDERS THAT FLOWED FROM THE HISTORIC *BROWN V. BOARD OF EDUCATION* CASE.

TODAY'S HEARING CONCERNS THE COURT'S CONTINUED ASSAULT ON CIVIL RIGHTS, THIS TIME INVOLVING THE VOTING RIGHTS ACT IN *PRESLEY V. ETOWAH COUNTY*. IF ONE THING IS CLEAR, MR. CHAIRMAN, IT IS THAT CONGRESS INTENDED THE VOTING RIGHTS ACT TO BE BROADLY INTERPRETED TO PREVENT WHITE MAJORITIES FROM DENYING POLITICAL POWER TO MINORITIES.

THIS CASE INVOLVED SEVERAL BLACK MEN WHO WERE ELECTED TO COUNTY COMMISSIONS IN ALABAMA ABOUT FIVE YEARS AGO FOR THE FIRST TIME SINCE DESEGREGATION. IN ONE INSTANCE THE WHITE MAJORITY OF A COMMISSION WHICH SUPERVISED ROAD-REPAIR VOTED TO CHANGE THE

RULES TO PREVENT THE newly-elected BLACK COMMISSIONER FROM EXERCISING ANY AUTHORITY. THE MAJORITY SIMPLY VOTED TO STRIP INDIVIDUAL COMMISSIONERS OF THEIR BUDGETARY AUTHORITY. THIS MEANT THAT WHERE A WHITE MAJORITY VOTED AS A BLOC, THE BLACK COMMISSIONER HAD NO POWER.

THE *PRESLEY* DECISION IS A MAJOR STEP BACKWARD FOR BLACK POLITICAL EMPOWERMENT BECAUSE IT OFFERS A BLUEPRINT TO JURISDICTIONS INTENT ON DISCRIMINATING AND EVADING THE REACH OF THE VOTING RIGHTS ACT. THIS WAS A BLATANT CASE OF A VIOLATION OF THE VOTING RIGHTS ACT. EVEN THE DEPARTMENT OF JUSTICE SUPPORTED THE BLACK PLAINTIFFS IN THIS CASE.

ON AT LEAST EIGHT OCCASIONS SINCE 1975, THE DEPARTMENT OF JUSTICE HAS REFUSED TO PRECLEAR CHANGES IN THE POWER OF ELECTED OFFICIALS THAT HAD A POTENTIALLY DISCRIMINATORY IMPACT ON BLACK VOTERS. THEREFORE, MR. CHAIRMAN I AM APPALLED THAT THE HEAD OF THE CIVIL RIGHTS DIVISION, WOULD COME HERE TODAY AND TESTIFY THAT HE IS NOT SURE WHETHER WE NEED LEGISLATION TO CORRECT THIS DECISION. THIS IS THE SAME POSITION HE TOOK AFTER THE *WARDS COVE*. IF IT IS NOT CLEAR TO HIM, IT IS CERTAINLY CLEAR TO ME THAT CONGRESS WILL ONCE AGAIN HAVE TO STEP IN AND OVERTURN THIS DECISION.

STATEMENT OF LAUGHLIN MCDONALD
AMERICAN CIVIL LIBERTIES UNION
SOUTHERN REGIONAL OFFICE, ATLANTA, GEORGIA

I. Introduction.

In two recent decisions, Presley v. Etowah County Commission[1] and West Virginia University Hospitals, Inc. v. Casey,[2] the Supreme Court abrogated long standing practices in the application of the Voting Rights Act of 1965, or seriously weakened the enforcement of minority voting rights. Congress should take corrective action by amending the Act to restore the law to what it was prior to these two decisions, as it did in 1982 when it restored the "results" test to Section 2 of the Act in response to the limiting decision of the Court in City of Mobile v. Bolden.[3]

II. Presley v. Etowah County Commission

On January 27, 1992, the Supreme Court decided two cases from Alabama, Presley v. Etowah County Commission and Mack v. Russell County Commission, consolidated sub nom. Presley v. Etowah County Commission, and held that changes affecting only the allocation of power among governmental officials are not changes "with respect to voting," and are therefore not subject to preclearance under

---

[1] 112 S.Ct. 820 (1992).

[2] 111 S.Ct. 1138 (1991).

[3] 446 U.S. 55 (1980). In amending Section 2, Congress intended "to restore the 'results test' - the legal standard that governed voting discrimination cases prior to our decision in Mobile v. Bolden." Thornburg v. Gingles, 478 U.S. 30, 44 n.8 (1986).

Section 5 of the Voting Rights Act.[1] The Etowah County case involved a resolution (the "Common Fund Resolution") adopted by the county commission shortly after a black, plaintiff Presley, was elected to the commission subsequent to a consent decree in a case which challenged the preexisting method of elections as being racially discriminatory. The Common Fund Resolution altered the prior practice of allowing each commissioner full authority to determine how to spend funds allocated to his own road district and placed all money budgeted for road work in a common fund subject to the control of the commission as a whole. The district court held that the Common Fund Resolution was not subject to preclearance, and Presley appealed.

In the Russell County case the commission adopted a "Unit System" which abolished individual road districts and transferred responsibility for all road operations to the county engineer, who was appointed by the commission. The district court held the change was not covered by Section 5 and the plaintiffs appealed.

The Supreme Court affirmed. A majority (Kennedy, Rehnquist, O'Connor, Scalia, Souter and Thomas) held that the plaintiffs, and the United States, which supported the plaintiffs as amicus on appeal, had failed to provide a workable standard for distinguishing between changes in rules governing voting and changes in the routine organization and functioning of government. According to the Court,

---

[1] By its terms Section 5, 42 U.S.C. §1973c, requires covered jurisdictions to preclear any new "standard, practice, or procedure with respect to voting."

> no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision. Rather, the Act by its terms covers any 'voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.' 42 U.S.C. § 1973c. A faithful effort to implement the design of the statute must begin by drawing lines between those governmental decisions that involve voting and those that do not.[5]

The majority indicated, however, that while the conduct in question was not subject to Section 5, it might be "actionable under a different remedial scheme."[6]

Justices Stevens, White and Blackmun dissented. They noted that the prior decisions of the Court had defined "voting" for purposes of the Voting Rights Act broadly to include "all action necessary to make a vote effective,"[7] and that prior to Presley the federal courts and the Attorney General had uniformly agreed that "§ 5 covered transfers of decisionmaking power that had a potential for discrimination against minority voters."[8] In addition, they argued that to exempt the changes in question from preclearance would allow jurisdictions to transfer the authority of black elected officials to other officials controlled by the majority and thus undermine the remedial purposes of the Act.

---

[5] 112 S.Ct. at 829.

[6] 112 S.Ct. at 832. Although the language of the Court is laconic, presumably the scheme to which the Court referred is the Fourteenth Amendment, which requires proof of intentional discrimination to establish a violation. City of Mobile v. Bolden, supra.

[7] 112 S.Ct. at 835.

[8] 112 S.Ct. at 833.

In response to the majority's claim that there was no principled way to distinguish between changes in decisionmaking authority which were covered by Section 5 and those which were not, the dissent proposed that any change "that reallocates decisionmaking power by transferring authority from an elected district representative to an official, or a group, controlled by the majority, has the . . . potential for discrimination against the constituents in the disadvantaged districts," and should therefore be subject to preclearance.[9] Under such a definition, the changes in Etowah and Russell Counties would have been covered by Section 5.[10]

The decision in Presley is fundamentally inconsistent with the express intent of Congress that Section 5 be given the broadest possible scope to reach all proposed changes in voting in covered jurisdictions in order to determine if they have a discriminatory purpose or effect. The Court's decision is also at odds with prior judicial precedent, and represents a clear retreat from responsible enforcement of equal voting rights.

A. Section 5: An Overview

Section 5 of the Voting Rights Act requires certain jurisdictions which used a discriminatory test or device for voting,[11] and in which voter registration or voting was depressed, to preclear all their proposed changes in voting laws or practices by proving to federal officials that the changes do not have the purpose and will not have the effect of discriminating on account of race or color, or membership in a language minority.[12] Voting changes that are denied preclearance are ineffective as law and are unenforceable.[13]

---

[9] 112 S.Ct. at 840.

[10] The dissent also proposed a more limited definition which would have covered only the change in Etowah County, i.e. where the reallocation of decisionmaking authority was taken (1) after the victory of a black candidate, and (2) after the entry of a consent decree designed to give black voters an opportunity to have representation on an elective body. 112 S.Ct. at 839.

Coverage under Section 5 is determined by the Attorney General and the Director of Census based upon a formula that takes into account whether a jurisdiction used a test or device on the date of the 1964, 1968 or 1972 presidential elections, and whether less than one-half of the persons of voting age were registered or voted in the election.[14] Only those voting practices that are different from those in force or effect on November 1, 1964, 1968 or 1972, depending on whether the jurisdiction was covered in 1965, 1970 or 1975 respectively, are "changes" that must be precleared.

When it was enacted in 1965, Section 5 was a temporary, five year measure, and applied primarily in the South where discrimination in voting against African-Americans had been particularly blatant and systematic.[15] As a result of extensive hearings and findings that preclearance was still needed, and should be expanded, Congress extended and amended Section 5 in 1970, 1975 (extending coverage to language minorities), and 1982.[16] Section 5 is now scheduled to expire in the year 2007, and sixteen states or parts of states, literally from the four corners of the nation, are subject to the statute.[17]

---

[11] The term "test or device" includes literacy tests, educational requirements, good character tests, and exclusively English language registration procedures and elections where a single linguistic minority comprises more than 5 percent of the voting age population of the jurisdiction. 42 U.S.C. §§1973b(c), 1973aa-1a(b).

[12] Language minorities are defined as American Indians, Asians, Alaskan Natives and those of Spanish heritage. 42 U.S.C. §1973l(c)(3).

[13] Clark v. Roemer, 111 S.Ct. 2096, 2101 (1991), and cases cited therein.

[14] 42 U.S.C. §1973b(b).

The Act also contains a so-called "pocket trigger," Section 3,[18] designed to reach pockets of discrimination in jurisdictions not otherwise covered by Section 5. Any federal court that has found a violation of voting rights protected by the fourteenth or fifteenth amendments may invoke the pocket trigger and require the offending jurisdiction to preclear some, or all, of its new voting practices. Section 3 has been occasionally, but not widely, used.[19]

---

[15] South Carolina v. Katzenbach, 383 U.S. 301, 309, 335 (1966); S. Rep. No. 295, 94th Cong., 2d Sess. 12 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 774, 777-78.

[16] 84 Stat. 314; 89 Stat. 402; 96 Stat. 131; 42 U.S.C. §1973b(a)(8); S. Rep. No. 417, 97th Cong., 2d Sess. 10 (1982), reprinted in 1982 U.S.Code Cong. & Ad. News 177, 187. The various amendments have been held constitutional, City of Rome v. United States, 446 U.S. 156, 182 (1980), or applied as a matter of course. Clark v. Roemer, 111 S.Ct. 2096 (1991).

[17] The covered jurisdictions are: Alabama (entire state); Alaska (entire state); Arizona (thirteen counties); California (five counties); Florida (five counties); Georgia (entire state); Louisiana (entire state); Michigan (two townships); Mississippi (entire state); New Hampshire (ten towns); New York (five counties); North Carolina (forty counties); South Carolina (entire state); South Dakota (two counties); Texas (entire state); Virginia (entire state). 28 C.F.R. §51 Appendix - Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended.

[18] 42 U.S.C. §1973a(c).

A jurisdiction may obtain preclearance administratively, by making a submission to the Attorney General, or judicially, by filing a declaratory judgment action before a three-judge court in the federal district court for the District of Columbia. No matter which preclearance route it selects, and it may pursue either or both, including simultaneously, the submitting jurisdiction has the burden of proof.[20] The allocation of the burden of proof was designed "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims."[21] Requiring a jurisdiction to seek preclearance in the District of Columbia was intended to provide centralized review and "enhance[ ] the likelihood that recurring problems will be resolved in a consistent and expeditious way."[22]

Actions to require a jurisdiction to comply with Section 5 are also heard by a three-judge court, but in the local federal district court. In such cases the only issues are those of coverage, i.e., whether the jurisdiction is subject to Section 5, whether the disputed change is one affecting voting, and whether it has been precleared. The local district court has no jurisdiction to determine whether a covered change has a discriminatory purpose or effect, since these are issues that can only be resolved by the Attorney General or the federal district court in the District of Columbia.[23] A plaintiff's remedies include an injunction against further use of the change absent preclearance, and retroactive relief, such as a new election, where appropriate.[24]

---

[19] E.g., Jeffers v. Clinton, 740 F.Supp. 585, 601 (E.D.Ark. 1990)(requiring preclearance of any use of a majority vote requirement in general elections); McMillan v. Escambia County, No. 77-0432 (N.D.Fla. Dec. 3, 1979), aff'd, 638 F.2d 1539 (5th Cir. 1981); Brown v. Board of Commissioners of the City of Chattanooga, Tennessee, Civ. No. CIV-1-87-388 (E.D.Tenn. Jan. 11, 1990)(requiring Section 5 preclearance of the city's 1990 redistricting); Cuthair v. Montezuma-Cortez, Colorado School District RE-1, Civ. No. 89 C 964 (D.Col. April 9, 1990)(requiring preclearance of any attempt to restore at-large elections for the board of education).

[20] City of Rome v. United States, 446 U.S. 156, 172, 185 (1980).

[21] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

[22] McDaniel v. Sanchez, 452 U.S. 130, 151 (1981).

There is no appeal from the preclearance decision of the Attorney General,[25] although a submitting jurisdiction may seek de novo judicial review of its proposed voting change in the federal district courts for the District of Columbia. Any party to the litigation may appeal directly to the Supreme Court.[26]

Administrative preclearance was not part of the original Voting Rights Act proposal, but was added by Congress to provide a simple and more expeditious route for Section 5 compliance than through litigation.[27] The Attorney General is required to make a decision within 60 days of the submission, or 120 days if he requests, or a jurisdiction submits, additional information.[28] Not surprisingly, most jurisdictions have chosen administrative preclearance and resorted to litigation, if at all, only after an objection from the Attorney General.[29]

---

[23] Allen v. State Board of Elections, 393 U.S. 544, 555-56 n.19 (1969); United States v. Board of Supervisors of Warren County, Mississippi, 429 U.S. 643, 647 (1977).

[24] NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985).

[25] Morris v. Gressette, 432 U.S. 491 (1977).

[26] 42 U.S.C. §1973c. See City of Pleasant Grove v. United States, 479 U.S. 462 (1987).

As a result of the 1982 amendments, jurisdictions down to the county level may "bailout" from Section 5 coverage by bringing declaratory judgment actions in the federal district courts for the District of Columbia and showing that during the preceding ten years they have complied with the law and undertaken constructive efforts to provide minorities equal opportunities for political participation.[30] Bailout was designed to insure that discrimination prone jurisdictions could not easily escape the preclearance requirement, and to provide an incentive to covered entities to change the discriminatory features of their electoral systems.[31] Very few jurisdictions, however, have actually attempted or achieved bailout.

---

[27] Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary, 92 Cong., 2d Sess., Enforcement of the Voting Rights Act of 1965 in Mississippi 10-11 (Comm. Print 1972).

[28] Garcia v. Uvalde County, 455 F.Supp. 101, 104 (W.D.Tex. 1978), aff'd, 439 U.S. 1059 (1979).

[29] E.g., City of Pleasant Grove v. United States, 479 U.S. 462 (1987).

[30] 42 U.S.C. §1973b(a). Prior to the 1982 amendment, a jurisdiction could bailout by showing that it had not used a discriminatory test or device for voting within a predetermined number of years, depending on when the jurisdiction was covered by Section 5.

B. Judicial Construction of Section 5

Preclearance, with its burden of proof and unique venue requirements, was clearly the most controversial provision of the 1965 Act.[32] Justice Hugo Black, in his "conquered provinces" dissent in South Carolina v. Katzenbach,[33] doubtlessly expressed the sentiments of many, particularly in the South at which the statute was initially aimed, that Section 5 was a humiliating and unwarranted intrusion into state autonomy. According to Justice Black:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.[34]

A majority of the Court, however, noting the "unremitting and ingenious defiance of the Constitution" in certain sections of the country, the failure of litigation on a case-by-case basis to end discrimination in voting, and the repeated attempts by local jurisdictions to evade the law by enacting new and different discriminatory practices, found Section 5 to be constitutional.[35] While acknowledging that preclearance was an "uncommon exercise of congressional power," the Court held that it was justified by the exceptional history of voting discrimination in the effected jurisdictions.[36]

---

[31] H.R. Rep. No. 227, 97th Cong., 1st Sess. 37 (1981); S. Rep. No. 417, 97th Cong., 2d Sess. 44 (1982).

[32] Other provisions of the Act include: 42 U.S.C. §1973, prohibiting voting practices that "result" in discrimination; 42 U.S.C. §1973b, abolishing "tests or devices" for voting; 42 U.S.C. §1973j, establishing criminal penalties for violations of the Act; 42 U.S.C. §1973aa-6, establishing the right of disabled or illiterate persons to receive assistance in voting; 42 U.S.C. §1973aa-1, abolishing durational residency requirements and establishing uniform standards for absentee voting in presidential elections; 42 U.S.C. §1973d, f, providing for the appointment of federal examiners and observers; and, 42 U.S.C. §§1973b, 1973aa-1a, providing for special assistance to language minorities.

[33] 383 U.S. 301, 359 (1966).

[34] 383 U.S. at 334.

In its first case construing the reach of Section 5, Allen v. State Board of Elections,[37] the Supreme Court, relying upon the legislative history of the Act, said the statute must be given "the broadest possible scope" to reach changes in voting which altered the election laws or practices of a covered jurisdiction in even a minor way. Allen was critical because it rejected the defendants' argument that Section 5 applied only to those state enactments which prescribed who could register to vote. Had such a limiting construction been adopted, Section 5 would have been rendered virtually meaningless, and many of the gains in minority political participation, for example, those flowing from federal review of state and local redistricting plans, would never have been realized.

The Supreme Court, with the two important exceptions of

---

[35] 383 U.S. at 309.

[36] 383 U.S. at 335.

[37] 393 U.S. 544, 566-67 (1969).

Presley v. Etowah County Commission and *Beer v. United States*,[38] discussed below, has consistently followed *Allen*, despite repeated requests from covered jurisdictions to exempt specific practices or restrict the scope of the statute. While Section 5 is not a mere inventory of voting procedures, but is concerned with "the reality of changed practices as they effect Negro voters,"[39] specific practices held subject to preclearance include: new procedures for casting write-in votes, changes from district to at-large elections, changes from elected to appointed county officials, changes in the requirements for independent candidates running in general elections,[40] annexations, the relocation of a polling place, a change by a local jurisdiction in its method of elections to conform to pre-existing state law,[41] majority vote requirements, numbered posts, staggered terms, residency requirements,[42] redistricting,[43] disallowance of neighborhood voter registration drives,[44] a personnel regulation of a county school board requiring employees to take a leave of absence to run for elected office,[45] the method of electing state court judges,[46] adding new judges to existing judicial circuits,[47] changing the time for candidate qualification, changing the date of an election, setting a special election,[48] and, changes in voting, e.g. enjoining an election, ordered into effect by a state court.[49]

---

[38] 425 U.S. 130 (1976).

[39] Georgia v. United States, 411 U.S. 526, 531 (1973).

[40] Allen v. State Board of Elections, 393 U.S. 544 (1969).

[41] Perkins v. Matthews, 400 U.S. 379 (1971).

[42] City of Rome v. United States, 446 U.S. 156 (1980).

[43] Georgia v. United States, 411 U.S. 526 (1973); Beer v. United States, 425 U.S. 130 (1976).

[44] NAACP, DeKalb County Chapter v. Georgia, 494 F.Supp. 668 (N.D.Ga. 1980).

[45] Dougherty County v. White, 439 U.S. 32 (1978).

Until the decision in Presley, the transfer of decision making authority from one official, or set of officials, to another was also held to be covered by Section 5. In Blanding v. Du Bose, for example, the Supreme Court held that a South Carolina law transferring powers of county governance from state to county officials "required preclearance under § 5 of the Voting Rights Act."[50] Similarly, in Hardy v. Wallace[51] the district court held that a statute transferring the power to appoint members of a county racing commission from the local legislative delegation to the governor was a change subject to Section 5. The court stressed the fact that "the transfer of appointment authority to the governor, over 99.7% of whose constituents are not inhabitants of Greene County, substantially dilutes the power of voters in Greene County by effectively eliminating the power of such voters over the Commission." And in Robinson v. Alabama State Department of Education,[52] the court held that a transfer of authority from a board of education whose members were elected county wide to one whose members were appointed by the city council was required to be precleared under Section 5.[53]

---

[46] Clark v. Roemer, 111 S.Ct. 2096 (1991).

[47] Brooks v. Georgia State Board of Elections, 775 F.Supp. 1470 (S.D.Ga. 1989), aff'd sub nom. Georgia State Board of Elections v. Brooks, 111 S.Ct. 288 (1990).

[48] NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985).

[49] Gresham v. Harris, 695 F.Supp. 1179 (N.D.Ga. 1988), aff'd, 110 S.Ct. 2556 (1990).

[50] 454 U.S. 390, 395 (1982). Accord, County Council of Sumter County v. United States, 555 F.Supp. 694, 701 (D.D.C. 1983)("the shift of power" from state to county officials was subject to Section 5); Horry County v. United States, 449 F.Supp. 990, 995 (D.D.C. 1978)(implementation of home rule was subject to Section 5 in that "the change involved reallocates governmental powers among elected officials voted upon by different constituencies"); McCain v. Lybrand, 465 U.S. 236, 250 n.17 (1984)(giving as an example of a voting change subject to Section 5 "the basic reallocation of authority from the state legislative delegation to the council").

[51] 603 F.Supp. 174 (N.D.Ala. 1985).

The courts and the Attorney General, pursuant to regulations governing the administration of Section 5, have also generally construed the procedures for complying with preclearance in a broad manner to effectuate the remedial purposes of the statute, and in light of the historical experience which it reflects.[54] A submission, for example, must be made in an "unambiguous and recordable manner,"[55] and must contain a "clear statement of the change explaining the difference between the submitted change and the prior law or practice."[56] Any ambiguity in the scope of a preclearance request "must be resolved against the submitting authority."[57] Applying these standards, the Supreme Court has rejected the argument that the submission of a comprehensive election code by a state granting municipalities the option of adopting majority vote and numbered posts requirements constituted preclearance of such procedures implemented by particular cities.[58] In other cases the Court has rejected claims that preclearance of a voting change had the effect of preclearing earlier related changes that were not themselves submitted, or to which the Attorney General had objected.[59]

---

[52] 652 F.Supp. 484 (M.D.Ala. 1987).

[53] Consistent with these decisions, the Attorney General has on a number of occasions denied preclearance to changes in the power of elected officials that had a potentially discriminatory impact on minority voters. Presley v. Etowah County Commission, supra, 112 S.Ct. at 833 (dissenting opinion of J. Stevens).

[54] McCain v. Lybrand, 465 U.S. 236, 246 (1984). The regulations are "entitled to considerable deference." NAACP v. Hampton County Election Commission, 470 U.S. 166, 179 (1985).

[55] City of Rome v. United States, 446 U.S. 156, 169 (1980); McCain v. Lybrand, 465 U.S. 236 (1984).

C. Congressional Affirmation of the Allen Standards

When Congress extended and amended the Voting Rights Act in 1970, 1975 and 1982, it expressly approved and incorporated the judicial construction of Section 5 contained in Allen v. State Board of Elections and the decisions which followed it. As the Supreme Court has noted, "[a]fter extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the Allen case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5."[60] Similarly, when Congress extended Section 5 in 1975, it expressly endorsed the Allen standards for preclearance: "Again in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the 'broad interpretations to the scope of Section 5' in Allen and Perkins v. Matthews."[61] Finally,

---

[56] 28 C.F.R. §51.27(c).

[57] McCain v. Lybrand, 465 U.S. 236, 251, 257 (1984).

[58] City of Rome v. United States, 446 U.S. 156, 169 (1980).

[59] McCain v. Lybrand, 465 U.S. 236 (1984); Clark v. Roemer, 111 S.Ct. 2096, 2102 (1991).

> the legislative history of the most recent extension of the Voting Rights Act in 1982 reveals that the congressional commitment to its continued enforcement is firm. The Senate Committee found 'virtually unanimity among those who [had] studied the record,' S.Rep. No. 97-417, p. 9 (1982), that § 5 should be extended. And, as it had in previous extensions of the Act, Congress specifically endorsed a broad construction of the provision.[62]

Thus, each time Congress has considered the scope of Section 5, it has expressly approved the broad construction mandated by Allen and the decisions which have implemented it.

D. Congressional Override; Beer v. United States

Significantly, on the one occasion prior to Presley when the Supreme Court departed significantly from a broad construction of Section 5 - in Beer v. United States[63] - Congress amended the act to correct and clarify the standards applicable to preclearance. In South Carolina v. Katzenbach,[64] Chief Justice Warren wrote that the purpose of Section 5 was the "suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination." Despite this broad language, and despite the Court's prior construction of the scope of the statute, a majority held in *Beer v. United States* that only changes which were retrogressive or affirmatively diminished minority voting rights were prohibited by the "effect" prong of Section 5. Since the plan under consideration in *Beer* actually enhanced the position of minority voters by creating two districts in which blacks were a population majority, and increasing the black voter majority in one of the districts, the Court concluded it "can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of §5."[63] Justices White, Marshall and Brennan dissented, arguing that the plan failed to provide blacks "fair representation," and that the city failed to present a substantial justification for its proposal.[64]

---

[60] Georgia v. United States, 411 U.S. 526, 533 (1973).

[61] Dougherty County Board of Education v. White, 439 U.S. 32, 38-9 (1978).

[62] NAACP v. Hampton County Election Commission, 470 U.S. 166, 176 (1985).

[63] 425 U.S. 130 (1976).

[64] 383 U.S. 301, 316 (1966).

In recognition of *Beer*'s limitations and potential harshness, the courts created a number of exceptions to the strict application of the retrogression principle. For example, the District of Columbia court has held that a new legislative plan cannot be approved, even if it is not retrogressive compared with the preexisting legislative plan, if it diminishes minority voting strength when compared with an intervening court ordered plan.[67] Preexisting districts that have not themselves been precleared may also not be used in determining if a submission is retrogressive.[68] In Wilkes County, Georgia v. United States,[69] the court created another important exception to Beer where an existing plan was malapportioned. Under such circumstances, retrogression should be measured, not with reference to the existing plan, but "with options for properly apportioned single-member district plans."[70]

---

[63] Beer v. United States, 425 U.S. 130, 141 (1976).

[64] 425 U.S. at 145, 163.

Congress was aware of Beer and its limitations when it extended and amended the Voting Rights Act in 1982. In amending Section 2 it incorporated a results, or racial fairness, standard for determining the lawfulness of voting practices,[71] and provided that the amended statute was to apply to Section 5 preclearance.

---

[67] Mississippi v. United States, 490 F.Supp. 569, 582 (D.D.C.), aff'd mem., 444 U.S. 1050 (1980); Mississippi v. Smith, 541 F.Supp. 1329, 1333 (D.D.C. 1982), appeal dism'd, 461 U.S. 912 (1983).

[68] Mississippi v. Smith, 541 F.Supp. 1329, 1332 (D.D.C. 1982). Accord, 28 C.F.R. §51.54(b)(3).

[69] Wilkes County v. United States, 450 F.Supp. 1171 (D.D.C. 1978), aff'd mem., 439 U.S. 99 (1981).

[70] 450 F.Supp. at 1178.

[71] Congress identified a number of factors derived from White v. Regester, 412 U.S. 755 (1973), and other voting cases that could establish a violation of the results standard of amended Section 2, such as racial bloc voting, a history of discrimination, depressed levels of minority employment and income, few minorities elected to office, the presence of slating groups, the use of enhancing devices (such as majority vote requirements), and racial campaign appeals. S. Rep. No. 417, 97th Cong., 2d Sess. 28-30 (1982). In its first case construing the scope of Section 2, Thornburg v. Gingles, supra, 478 U.S. at 51, 82-3, the Court adopted a streamlined test for finding a violation of the statute in a challenge to legislative multi-member districts. The three critical facts were whether the minority was sufficiently large and geographically compact to constitute a majority in one or more single-member districts, whether the minority was politically

According to the Senate Report that accompanied the amendments:

> Under the rule of Beer v. United States . . . a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' . . . In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure so discriminates as to violate section 2.[72]

Two of the principal cosponsors of the 1982 amendments, Senator Kennedy and Representative Sensenbrenner, reiterated on the floors of the Senate and House during the legislative debates that "where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2."[73] Representative Edwards, a sponsor of the final bill and chair of the House subcommittee with jurisdiction over the extension of the Act, concurred with Representative Sensenbrenner's interpretation of the bill.[74]

Congress further confirmed its intention that Section 2 standards were to apply to preclearance when it conducted oversight hearings in 1985 on the Attorney General's proposed revisions of the regulations governing Section 5. According to the House

---

cohesive, i.e. tended to vote as a bloc, and whether the majority voted sufficiently as a bloc usually to defeat the candidates preferred by the minority.

[72] S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (citations omitted).

[73] 128 Cong. Rec. S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner).

[74] Id.

Report, "the Subcommittee concludes that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations."[75]

Thus, where the Supreme Court has improperly restricted the scope and meaning of Section 5, Congress has not hesitated to enact corrective legislation.[76] In the wake of *Presley*, Congress should again take action to restore the law to what it was prior to 1992, and to reinstate the interpretation of Section 5 intended by Congress when the act was passed in 1965 and amended in 1970, 1975 and 1982.

E. The Impact of Presley; The Case of Jesup, Georgia

The great majority of voting changes proposed by jurisdictions covered by Section 5 will no doubt be unaffected by the decision in *Presley*. However, *Presley* will have, and indeed has already had, a negative impact, aside from in Etowah and Russell Counties, on minority voting rights.

---

[75] H.R. Rep. Ser. No. 9, supra, at 5. The issue of the application of Section 2 standards in a Section 5 case was presented in *City of Lockhart v. United States*, 460 U.S. 124, 133 n.9 (1983), but because the district court had not passed on it the Supreme Court declined to grant review in the first instance. The issue has been presented to the federal district court in the District of Columbia on several occasions, but the court has always decided the litigation on other grounds without reaching the Section 2 issue. E.g., County Council of Sumter County v. United States, 555 F.Supp. 694 (D.D.C. 1983).

[76] As noted infra, Congress further showed its special concern for voting rights by amending Section 2 in 1982 following the decision in City of Mobile v. Bolden, supra, to provide that voting practices are unlawful that have a discriminatory result. Thronburg v. Gingles, supra.

In Jesup, Georgia, for example, blacks successfully challenged the at-large method of electing the city council in 1986.[77]. Jesup is 38% black, but prior to the lawsuit only one black had ever been elected to the council in the town's history, and no black had ever been elected mayor or appointed mayor pro tem by the council members. The consent order entered by the district court created six single member districts, two of which were majority black. At the first election held under the new plan in 1986, a black, James Copeland, was elected from one of the majority black districts. At the second election held in 1990, Copeland was reelected and a second black was elected form the other majority black district.

By custom and practice, following each election the city council selected from its membership a person to serve as the mayor pro tem for a term to run concurrently with the mayor's four year term. The mayor pro tem presided over council meetings and represented the city at ceremonial functions in the absence of the mayor. At the organizational meeting held after the 1990 election, Copeland was nominated by the other black councilmember to be mayor pro tem, and one of the white members seconded the nomination. The ensuing vote was a 3-3 tie, with the mayor breaking the tie by voting for Copeland. After the vote, one of the white members made a motion that the term of the mayor pro tem be limited to one year. The motion was seconded and the vote was again a 3-3 tie. The mayor voted against the motion and it was defeated.

---

[77] Freeze v. Jesup, Civ. No. 286-128 (S.D.Ga. Oct. 15, 1986).

Copeland served as mayor pro tem for approximately eight months. Several white members, however, refused to attend any meetings of the council over which he presided in the mayor's absence. In the fall of 1991 one of the white members who had refused to attend meetings chaired by Copeland, stated at a council meeting that the city charter did not authorize the position of mayor pro tem and moved that the position be abolished. The motion was seconded and carried by a vote of 4-2, with the two black members dissenting.

Mr. Copeland, who believes that the decision to abolish the position of mayor pro tem was motivated by a racially discriminatory purpose, and has the discriminatory effect of diminishing the authority of a recently elected black official and diluting the voting strength of black voters who supported him, contacted the ACLU for assistance. On January 27, 1992 - the day, ironically, the decision in Presley was announced - an attorney for the ACLU wrote the city attorney of Jesup and advised him that under existing legal precedent, citing, inter alia, Horry County v. United States, the abolition by the city council of the position of mayor pro tem was a change in voting for which preclearance was required under Section 5 of the Voting Rights Act. A copy of the January 27, 1992 letter is attached as Exhibit A. The next day, the ACLU attorney learned of the decision in Presley, as apparently did the Jesup city attorney, for the city attorney has never responded to the ACLU's letter.

F. Changes which Diminish the Power of Minority Elected Officials Should Be subject to Section 5

The exclusion of blacks from effective participation in the political process by enactment of practices that diminish the decisionmaking authority of recently elected black officials is as much to be condemned as a matter of national policy as the dilution of minority voting strength through racial gerrymandering, the abolition of district elections, the abolition of elected positions, or the adoption of onerous candidacy requirements, all of which are admittedly subject to preclearance under Section 5.[78] That seems particularly true where, as in Etowah and Russell Counties, Alabama, and Jesup, Georgia, the black officials were elected from majority black districts and often pursuant to remedial voting plans designed to correct the historic dilution of minority voting strength and the exclusion of blacks from office.

It is no response to suggest, as does the majority in Presley, that such discriminatory practices may be challengeable "under a different remedial scheme."[79] In enacting Section 5 Congress intended not only that covered jurisdictions preclear all their proposed changes in voting, but that the burdens of litigation and delay be shifted "from the perpetrators of the evil [of discrimination in voting] to its victims."[80] Changes affecting the political and voting rights of minorities of the kind presented in Presley are clear examples of the continuing "unremitting and ingenious defiance of the Constitution" which the Voting Rights Act was designed to counter.[81] Such changes should be subjected to federal review under Section 5.

---

[78] Perkins v. Matthews, 400 U.S. 379, 389 n.8 (1971).

[79] 112 S.Ct. at 832.

[80] South Carolina v. Katzenbach, supra, 383 U.S. at 328.

The majority in Presley expressed the concern that requiring preclearance of transfers of authority among elected officials would subject such routine matters as the adoption of a county budget to Section 5 oversight. The simple answer is that Congress, in amending Section 5 in response to the decision in Presley, could provide that such changes which could have no impact on minority voting strength would not be subject to Section 5.

The amendment of Section 5 to require preclearance of transfers of decisionmaking authority that have a potential for discrimination against minority voters would merely restore the law to what it was prior to the decision in Presley, and would not cause a change in the prior administration of Section 5 by the Attorney General. In those presently infrequent - but important - cases where minority voting strength is being diluted by the transfer of power from minority to majority elected officials, and where the potential for discrimination exists, Section 5 review should be required.

Although instances of the discriminatory transfer of decisionmaking authority have been relatively infrequent,[82] they will likely increase as a result of the Presley decision. The history of voting rights enforcement has shown a pattern of white reaction to gains in political participation by minorities. Indeed, the existence of such a pattern was the rationale for the preclearance requirement. The repeated attempts by local jurisdictions to evade the law by enacting new and different discriminatory practices was the basis upon which the Court found Section 5 constitutional in South Carolina v. Katzenbach,[83] and the basis upon which Congress extended preclearance in 1970, 1975 and 1982. Congress warned in 1982 that without continuation of Section 5, "many of the advances of the past decade could be wiped out overnight with new discriminatory schemes and devices."[84]

---

[81] South Carolina v. Katzenbach, supra, 383 U.S. at 309.

[82] Since 1975, the Department of Justice has denied Section 5 preclearance on only eight occasions to changes in the decisisonmaking authority of elected officials. Presley v. Etowah County Commission, supra, 112 S.Ct. at 833.

The concerns of Congress were echoed by historian C. Vann Woodard in his testimony before the House of Representatives during the debate on extension of the Voting Rights Act in 1981:

> I do think it reasonable, however, to warn that a weakening of that act, especially the preclearance clause, will open the door to a rush of measures to abridge, diminish, and dilute if not emasculate the power of the black vote in southern states. Previous testimony before your committee has shown how persistent and effective such efforts have been even with the preclearance law in effect. Remove that law and the permissiveness will likely become irresistible - in spite of promises to the contrary.[85]

Unless we ignore our history, we can fairly conclude that Presley will open the door to the enactment of measures by covered jurisdictions that emasculate the power of newly elected minority officials by transferring decisionmaking authority to officials or groups controlled by the majority. In this fashion covered jurisdictions will be able to accomplish indirectly what they could not do directly, and that is to deny or abridge the power of the minority vote.

---

[83] 383 U.S. at 309.

[84] S. Rep. No. 417, supra, at 10.

[85] Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess., 2001 (1981).

When it was enacted in 1965, the Voting Rights Act so effectively prevented discrimination in registering and voting that local jurisdictions ceased fighting on this front. Instead, the efforts to exclude minorities from political participation shifted to the adoption of election structures, such as at-large elections and majority vote requirements, that diluted minority voting strength.[86] Now that challenges to discriminatory election structures have been facilitated by the 1982 amendments of the Voting Rights Act, there is a grave danger that those who seek to maintain exclusive white control will simply remove decisionmaking authority from minority elected officials. Section 5 should not countenance such an unjust result on the dubious theory that political decisionmaking and governance are unrelated to voting.

To allow minorities the right to vote, but deny them the equal right to govern, would betray the broad vision of political equality inherent in the Voting Rights Act.[87] Congress should take corrective action by amending Section 5 and restoring the original meaning of the Act.

---

[86] L. McDonald, "The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance," 51 Tenn.L.Rev. 1, 69-79 (1983).

[87] As expressed by Chief Justice Warren, the purpose of the Voting Rights Act was to provide minorities the opportunity "to participate for the first time on an equal basis in the government

III. West Virginia University Hospitals, Inc. v. Casey

In West Virginia University Hospitals, Inc. v. Casey,[88] the Court held that fees for services rendered by experts may not be shifted to the losing party under 42 U.S.C. §1988, a general fee shifting statute which permits the award of "a reasonable attorney's fee" to the prevailing side in civil rights litigation. Absent "explicit statutory authority" in the fee shifting statute, the only fee a court can award to an expert is the fee provided for by 28 U.S.C. §§1920 and 1821 when an expert appears at trial.[89] Although Casey involved §1988, rather than 42 U.S.C. §1973le, the separate and additional fee shifting provision contained in the Voting Rights Act, §1973le suffers the same defect as §1988 in that it similarly does not provide "explicit statutory authority" for an award of expert fees. Section 1973le is therefore subject to the same limiting interpretation as §1988 contained in Casey.

A. The Impact of Casey Is Devastating

Excluding testimonial and nontestimonial fees of experts from the award of costs and fees to prevailing plaintiffs in voting

---

under which they live." South Carolina v. Katzenbach, supra, 383 U.S. at 337.

[88] 111 S.Ct. at 1148.

[89] 111 S.Ct. at 1141, 1148. Congress has authorized the recovery of expert fees in numerous fee shifting statutes. See, Casey, 111 S.Ct. at 1141-42 and n.4.

rights cases will have a devastating impact on the enforcement of minority voting rights. That is true because most voting cases, particularly vote dilution challenges under Section 2 of the Voting Rights Act,[90] cannot be brought without the assistance of experts.

In Thornburg v. Gingles,[91] the Supreme Court held that to establish a claim of vote dilution under Section 2 the plaintiffs must prove three things: (1) the minority is geographically compact, or could compose a majority in one or more single member districts; (2) the minority is politically cohesive, or tends to vote as a bloc; and (3) whites vote as a bloc usually to defeat the candidates preferred by the minority. It is literally impossible to prove these elements of a violation without the help of experts. A demographer is always required to draw maps and give testimony to show that the minority community is geographically compact. An expert is virtually always required to show that the minority community is politically cohesive, and that the majority votes as a bloc usually to defeat the candidates preferred by the minority.[92]

The principle method of proving racial bloc voting relied upon by the Court in Gingles, which has become the norm in Section 2 cases, was ecological regression analysis.[13] Regression analysis is highly sophisticated and produces scatter plots, correlations and estimates, and cannot be done by a lay person. There are no modern reported Section 2 vote dilution challenges which have been brought without the use of expert witnesses to prove the existence of racial bloc voting.

---

[90] 42 U.S.C. §1973.

[91] 478 U.S. 30 (1986).

[92] The only exception would be in those extremely rare cases where election data are unavailable and plaintiffs must rely exclusively on lay testimony. Generally, lay testimony is used to supplement the testimony of experts.

The Southern Regional Office of the ACLU (SRO), which presently has four lawyers on its staff, engages in voting rights litigation, principally on behalf of African Americans in the South and to some extent Native Americans in the West. During 1988, the SRO paid $20,108.75 to experts for consultative and testimonial services in connection with its voting rights litigation. In 1989, it paid $56,899.75 for similar services, and in 1990 $64,353.51.

In one of its most recent cases, Hall v. Holder,[14] a challenge to the at-large elected sole commissioner form of government in Bleckley County, Georgia, the SRO paid its experts $40,302.00. The plaintiffs used three experts in Hall. One was an historian who testified about the adoption and use of a majority vote requirement for county elections. A second performed statistical analysis of election data and testified about the existence of racial bloc voting. The third, because of the scarcity of precinct level data and the limited opportunity for statistical analysis, conducted an exit poll and testified about minority access to the political process. The testimony and analysis of the experts was relied upon extensively by both the trial and appellate courts, and plaintiffs could not have presented their case effectively in its absence.

---

[13] See, 478 U.S. at 52, 80-4.

[14] 757 F.Supp. 1560 (M.D.Ga. 1991), rev'd, 955 F.2d 1563 (11th Cir. 1992).

If minority plaintiffs, or the civil rights groups which often provide them with representation, are forced to absorb these costs, even in cases in which they are the prevailing parties, they will obviously be able to bring fewer cases and enforcement of minority voting rights will decline. Challenges will not be brought, not because they lack merit, but because the plaintiffs cannot afford to bring them. The result will be an increase of discrimination in the electorate and the gradual betrayal of the promises of the Voting Rights Act.

Congress should acknowledge, as it has done in the area of employment discrimination,[95] that the hiring and use of experts is essential to the preparation and prosecution of suits brought to enforce the provisions of the Voting Rights Act. Sections 1973le and 1988 should be amended to provide that the court may allow the prevailing party "a reasonable attorney's fee, including expert fees, as part of the costs."

The amendment of §§1973le and 1988 would not constitute a departure from the preexisting practice of some courts in voting rights cases. Even after the decision in Crawford Fitting Co. v.

---

[95] In Section 113 of the Civil Rights Act of 1991, Congress amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), to provided that prevailing plaintiffs were eligible to recover the costs of experts as part of their attorney's fee.

J.T. Gibbons, Inc.,[96] in which the Supreme Court held that §§1821 and 1920 did not authorize such payments because of the absence of explicit statutory authority, some courts still awarded the costs of experts to prevailing plaintiffs in voting cases. In Taylor v. Forrester,[97] for example, the court awarded fees to plaintiffs' expert in a Section 2 case on the grounds that he did not actually testify and that he performed the work of a paralegal whose time was compensable under §1988.[98] Similarly, in Jackson v. Edgefield County, South Carolina School District,[99] the court awarded the prevailing plaintiffs attorney's fees and costs, which included the cost of experts, finding that "they were reasonable and necessary for the presentation of Plaintiffs' claims."[100]

Congress has stated that in enacting provisions for the recovery by civil rights plaintiffs of their reasonable costs and fees it intended to encourage and give access to the federal courts to persons to vindicate their vital civil rights.[101] The decision in Casey is fundamentally at odds with congressional purpose of facilitating access to the federal courts and in making the prevailing party whole. Because Congress is master in the field of statutory construction it has the power to correct the mistake of the Court in Casey. The preexisting practice of allowing recovery of expert fees by prevailing plaintiffs should be restored.

---

[96] 482 U.S. 437 (1987).

[97] Civil Action No. 89-00777-R (E.D.Va. Nov. 30, 1990).

[98] See, Missouri v. Jenkins, 109 S.Ct. 2463 (1989).

[99] Civil Action No. 9:85-709-3 (D.S.C. July 7, 1987).

[100] Slip op. at 5.

[101] 111 S.Ct. at 1151-53 (dissenting opinion of J. Stevens).

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

SOUTHERN REGIONAL OFFICE

44 Forsyth Street, NW
Suite 202
Atlanta, GA 30303
(404) 523-2721

Laughlin McDonald
Director

Neil Bradley
Associate Director

Kathleen L. Wilde
Staff Counsel

Mary E. Wyckoff
[illegible]

Jim Grant
Paralegal

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944-9800

Nadine Strossen
President

Ira Glasser
Executive Director

January 27, 1992

City Attorney
City Hall
P.O. Box 427
Jesup, GA 31545

Re: Abolition of Mayor Pro Tem
and Section 5 Preclearance

Dear Sir or Madam:

This letter is written on behalf of James Copeland, whom I represent.

Mr. Copeland has brought to my attention the recent abolition of the position of mayor pro tem by the Jesup City Council. In my opinion, such action constitutes a change in voting for which preclearance must be sought under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, before it may be implemented.

As you know, the courts have held that Section 5 is to be given the broadest possible scope to cover even seemingly minor changes in voting. Allen v. State Board of Elections, 393 U.S. 544 (1969). I do not believe that there could be any real dispute that the change involved here, i.e., the abolition (and under dubious racial circumstances) of an office held by an elected official, is the kind of change that is subject to the preclearance requirement. See, Hardy v. Wallace, 603 F.Supp. 174 (N.D.Ala. 1985)(transfer of powers among elected officials is covered by Section 5); Allen v. State Board of Elections, supra (abolition of elected offices subject to preclearance); Horry County v. United States, 449 F.Supp. 990 (D.D.C. 1978)(changes in the decision making power of elected officials are covered by Section 5).

In order that I may advise my client concerning his legal remedies in this matter, I would appreciate your advising me within 10 days whether the city intends to submit the abolition of the position of mayor pro tem for Section 5 preclearance, and if so, whether it intends to restore the status quo ante pending submission.

Sincerely,

Laughlin McDonald

Laughlin McDonald

cc: James Copeland

Statement of Dayna L. Cunningham, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc.

On behalf of The NAACP Legal Defense and Educational Fund, Inc. I submit this statement asking Congress to amend the Voting Rights Act in response to *Presley v. Etowah County Commission*, 112 S.Ct. 820 (1992), the recent Supreme Court decision that severely restricts the scope of §5 of the Voting Rights Act, 42 U.S.C. §1973c.

The NAACP Legal Defense and Educational Fund, Inc, ("the Fund" or "LDF") provides legal representation to African Americans and other minorities, as well as to other persons in appropriate cases, in litigation to enforce their civil and constitutional rights. The Fund has a long history of involvement in voting rights, particularly in the South. We have litigated numerous cases challenging discriminatory electoral schemes, including registration practices. In 1985, Julius Chambers, Director-Counsel of the Fund, argued in the Supreme Court *Thornburg v. Gingles*, 478 U.S. 30 (1986), the landmark case that set out the standard for violation of §2 of the Voting Rights Act as amended in 1982. The following year, in conjunction with cooperating attorneys in Alabama, we brought the *Dillard* cases, *see Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala 1986), that successfully challenged discriminatory at-large districting schemes throughout the state of Alabama and led to election of Commissioners Presley and Mack, name plaintiffs in *Presley* and its companion case *Mack v. Russell County Commission*, 112 S. Ct. 820 (1992) The Fund has comprehensive practical experience with voting rights issues facing African Americans.

In *Presley*, the Court held that a change in county government that completely stripped budgetary authority from the first African American commissioner elected since Reconstruction, and made him unable to carry out the functions he was elected to perform, was not a change "with respect to voting" as defined by the statute. With this change, the majority white commission delegated to this African American commissioner, who was elected by his constituents to authorize bridge and road construction, the responsibility for overseeing upkeep of the courthouse.

The clear meaning of *Presley*, with its narrow focus on the technical aspect of voting procedures rather than on the broad meaning of "voting" as Congress defined it in §14(c) of the Act, is that the Supreme Court is trying to decouple the concept of representative self-government from the act of voting. This approach is starkly antithetical to the explicit instructions of Congress since the very inception of its fourteenth and fifteenth amendment enforcement efforts. Moreover, it provides a green light to a whole new generation of voting discrimination in which procedural rules within government effectively dilute minority votes. An amendment to the Voting Rights Act is urgently needed to clarify that transfers of authority, procedural rules and other voting practices that dilute the votes of the protected class by impairing the power of their elected representatives to participate in the governing process violate the Act.

Congress' Enforcement of the Fourteenth and Fifteenth Amendments

The United States Constitution imposes on Congress the responsibility to eradicate racial discrimination touching on the fundamental right to vote. There are two salient aspects of Congress' efforts to enforce fourteenth and fifteenth amendment voting guarantees: First, Congress always has met its responsibility by vigorously reaffirming and clarifying, in response to every new obstacle erected by defiant state and local governments, that its enforcement scheme applies to all forms of voting discrimination. Second, consistently Congress has striven to give real meaning to the bedrock democratic value of full political participation for protected minorities that is embodied in the Voting Rights Act.

In 1965, Congress already had a 100-year history of attempting to enforce the Constitution's voting guarantees. But experience under legislation passed in 1957, 1960, and 1964 had shown "the ingenuity and dedication of those determined to circumvent the guarantees of the 15th amendment," H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code, Cong. & Ad. News 2437, 2441. Congress learned that "barring one contrivance too often has caused no change in result, only in methods." *Id.*; *see also* 1965 Senate Report at 2543. In 1965, it concluded that "the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the fifteenth amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

In 1965, House and Senate hearings demonstrated that one of the principal means of frustrating African American voting rights was continuing barriers to voter registration. At the time, in jurisdictions with the most egregious voting rights violations, less than one in three African Americans was registered to vote, compared with about three out of four whites. Congress heard extensive testimony about widespread use of literacy, character, and comprehension tests and other racially discriminatory registration requirements, voter intimidation, stubborn refusal by local officials to register African American voters and the boundless ingenuity of backwards jurisdictions in inventing new techniques to disfranchise blacks.

Congress responded decisively to each of these concerns with a comprehensive scheme of public and private, legal and administrative voting rights protections. Called "the most important civil rights bill ever enacted by Congress,"[1] the Voting Rights Act temporarily outlawed the use of literacy tests and other discriminatory voter qualifications in certain jurisdictions, and brought these jurisdictions under federal government supervision through the mechanism of §5 preclearance procedures. Under §5, it placed the burden on covered jurisdictions to obtain approval of all changes in their voting practices by demonstrating that such changes did not discriminate against African American voters. It provided for the deployment of federal registrars to register African American voters and election observers to monitor local elections. Congress also created §2 to provide a right of action to challenge "pockets of discrimination" in jurisdictions that were not covered under §5.

---

[1] *Committee on the Judiciary*, H.R. Rep No. 227, 97th Cong, 1st Sess. 3 (1981).

It was "[i]n order to preclude . . . future State or local circumvention of the remedies and policies of the 1965 act" that Congress passed §5. H.R. Rep. No. 91-397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 Cong. Code & Ad. News 3283 [hereafter "1970 House Report"] *See, South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1965) (Congress concluded that covered states "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating black political powerlessness in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies contained in the Act itself").

Each time Congress has reaffirmed its commitment to voting rights enforcement, it has responded to evidence of unanticipated forms of discrimination and made clear that such discrimination falls within the reach of the Act and violates the promise of a meaningful vote. Each time that Congress has revisited §5, and has renewed and strengthened its commitment to §5's preclearance scheme, it has also reiterated its concern that, "with discrimination in registration and at the voting booth blocked," states and counties will develop other schemes to "undo or d the rights recently won by nonwhite voters." 1970 House Report at 3284; *see also, e.g.,* S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975)[2] [hereafter "1975 Senate Report"]; H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 14 (1982)[3] [hereafter "1982 House Report"]; S. Rep. No. 94-417, 97th Cong., 2d Sess. 6 (1982)[4] [hereafter "1982 Senate Report"].

Section 5 expressly was intended to assure that states and localities could not "continue their historical practice of excluding Negroes from the Southern political process," 1982 Senate Report at 7 (quoting 1965 Senate Report), by substituting more sophisticated exclusionary and dilutive techniques for outright disenfranchisement.[5] Congress made a judgment that it was preferable that the Attorney General and the District Court for the District of Columbia be called on to assess the purpose and effects of "complex and subtle" practices, 1982 Senate Report at 12, rather than permit continued denial of African Americans' right to vote.

---

[2] "As registration and voting of minority citizens increases, other measures must be resorted to which would dilute increasing minority voting strength."

[3] "The Committee has observed ... continued manipulation of registration procedures and the electoral process which effectively exclude minority participation from all stages of the political process."

[4] "Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote .... The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act."

[5] Because of this history, Congress has squarely rejected the idea that there can be any *per se* or *de minimis* exemptions from §5's coverage: "The discriminatory potential in seemingly innocent or insignificant changes can only be determined after the specific facts of the change are analyzed in context." 1982 House Report at 34-35; *see also* 1982 Senate Report at 7 (§5 "require[s] review of *any* new laws in covered areas that could directly or indirectly impair the right to vote")(emphasis added); *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969) ("Congress intended to reach any State

In 1970, lawmakers concluded that despite their most optimistic predictions,[6] persistent disparities in white and African American voter registration rates necessitated the renewal of §5's preclearance regime. In 1975, Congress recognized that Latinos, Asian Americans, Native Americans and Native Alaskans also require the protections of §5. Congress amended the Act to include these groups within its provisions but did not stop there. It made the nationwide ban on literacy tests permanent and enacted §203, a

---

enactment which altered the election law of a covered State in even a minor way."), *id*. at 568 (quoting Attorney General Katzenbach at the 1965 House hearings as rejecting the idea of any categorical exclusions "because there are an awful lot of things that could be started for purposes of evading the 15th amendment if there is the desire to do so"). Thus, "far from exempting alterations that might be perceived as minor, Congress failed to adopt such a suggestion when it was proposed in debates on the original Act." *NAACP v. Hampton County*, 470 U.S. 166, 176 (1985). *See* Brief for the United States at 21-22, *Presley v. Etowah County*.

[6] As one legislator testified: "[R]esistance to progress has been more subtle and more effective than I thought possible. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large-basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointment process has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed." Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538 and Similar Proposals Before the Subcomm. No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess. 3-4 (1969) (remarks of Rep. McCullough) (cited in Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413, 1420 (1991)).

sweeping nationwide requirement that entire states and certain local governments provide bilingual "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." 42 U.S.C. §203(b). That provision, which is so critical in making the right to political participation a reality for the language minority community, is once again up for renewal and the Legal Defense Fund unequivocally supports it.

In 1982, again responding to evidence of unanticipated obstacles to voting rights enforcement efforts, Congress did more than reauthorize the existing provisions of §5. It enhanced the protections of the statute, requiring that jurisdictions seeking to bail out from §5 supervision show affirmative steps taken to enhance voter participation. Voting Rights Act §4(a)(1)(F) (42 U.S.C. 1973(b)).[7] Most importantly, responding to the Supreme Court's decision in *Mobile v. Bolden* 446 U.S. 55 (1980)--holding that successful plaintiffs prove a violation of §2 by direct evidence of intent--Congress made explicitly clear in 1982 that §2 applied to any voting practices that had a racially discriminatory effect.

---

[7] The evolution of Congressman Hyde's position on the Voting Rights Act best demonstrates how Congress came to understand and to respond to the political reality within which the Act's enforcement efforts operated. Although he initially opposed the extension of section 5, after hearing extensive testimony about voting rights abuses, he changed his position "pursuant to an evolutionary process that my thinking has undergone during these hearings." Rep. Hyde's new position advocated that §5 coverage should be reauthorized and the bailout provisions made more strict because there are "persistent vestiges of discrimination present in [the covered jurisdictions'] electoral system and because no constructive steps have been taken to alter that fact. [And because] the bailout provision which is contained in the law now serves as a disincentive to progressive change." *Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 97th Cong., 1st Sess., Part 3 at, 1815-17.

In amending §2, Congress realized that despite the elimination of restrictive voter qualifications and inaccessible polling places[8]--crude "first generation" impediments to African American political participation, pervasive "second generation" voting obstacles--structures and practices that rendered meaningless the newly-won African American vote--persisted. Thus, in 1982, Congress explicitly affirmed its pledge to protect minorities' opportunity for meaningful political participation. Under the amended statute, a violation is established if under the "totality of the circumstances" it is shown that the political processes are "not equally open to participation" by protected voters. S. Rep. No. 417, 97th Cong., 2d Sess. 15-16 (1982); *See* Karlan, *Undoing the Right Thing*, 77 Va. Law Rev. 1 (1991).

Each successive amendment of the Voting Rights Act has represented a logical progression of Congress' pledge to "free [minority voters] from the near-tyranny of nonrepresentation." H.R. No. 439, 89th Cong., 1st. Sess. 1 (1965). As the following section demonstrates, a clarification that the Act applies to procedural rules and voting practices that dilute a minority's voting strength by impairing the power of its elected officials to participate in the decisionmaking or governing process is wholly consistent with this history. Indeed, lawmakers repeatedly have expressed their intention that the concept of representation under the Act include meaningful participation in the governing process. *See S. Rep. No. 417, 97th Cong., 2d Sess. 19* (citing with approval, *Reynolds v. Sims*, 377 U.S. 533 (1964)[9]; *See, also,* 111 Cong. Rec. 8363 (daily ed. April 23, 1965)(Statement of Sen. Javitts)[10]; 121 Cong. Rec. 24111 (daily ed. July 22, 1975)(Remarks of Sen. Tunney)[11]; *Id.*, at 24720 (daily ed. July 24, 1975)(Remarks of Sen Tunney)[12]; 128 Cong. Rec. 14,319 (1982)(Remarks of Sen Riegle).[13] A failure to clarify the statute

---

[8] Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va L. Rev. 1413, 1421, n.32.

---

[9] In *Reynolds*, the Supreme Court said:

> Representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.

377 U.S. at 565.

[10] "The right to vote is the cornerstone of our democratic society. A citizen's respect for law rests heavily on the belief that his voice is heard, directly or indirectly in the creation of law. . . . [T]here is every evidence that this bill is not only advisable, but absolutely necessary if every American is to be given the right to participate in this Government."

[11] "The Voting Rights Act is, if nothing else, an invitation to all Americans to participate in the process of government. . . ."

[12] When blacks get equal access to the political process they "hold[] their heads up higher [and feel] more a part of the system. They [will] feel their Government is more responsive to them."

[13] Sen. Riegle, one of the co-sponsors of the 1982 amendment, noted:

> Beyond the need to protect the voting rights of blacks and Hispanics and enable them to play an active role in the voting arenas, there is another compelling reason for us to renew the Voting Rights Act. I refer to the new political climate of the 1980's, with its blatant

to make Congress' intent explicit in light of the *Presley* decision will only encourage and entrench systems under which "[b]lacks may vote [but] . . . it is whites who will govern." Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 Harv. C.R.-C.L.L. Rev. 393, 394 (1989)

Procedural Rules of Government Can Dilute Minority Votes

This year, advocates of equal political opportunity must call on Congress again. The Court's decision in *Presley* condones a new kind of voting discrimination that has arisen with the increasing presence of African Americans and other minorities in government. Now that §§ 2 and 5 have been enforced for roughly ten years and 27 years respectively, African Americans and other minority voters are reaping the fruits of years of voter education, registration and mobilization. We have exhorted our communities to participation with the promise of meaningful representation flowing from a much-awaited seat at the table.

As African American and other minority officials have entered the halls of government, we have learned that in many jurisdictions, structures and procedures in the legislative halls

---

disregard for the disadvantaged and poor in our society. the one real safety net on which minorities and the poor can depend is their capacity to participate in the political system. The Voting Rights Act, to a large extent, has made this participation possible and meaningful. If you remove or water down this act, then you remove the most important tool people have to assert their own interests.

dilute our votes. We raise this problem in the context of the Voting Rights Act not to question substantive legislative outcomes. We do not believe that the Voting Rights Act can or should guarantee that our policy preferences are satisfied. The Act is not concerned, for example, with whether a particular public facility is built in a particular location. However, the Act should be relevant to determining, whatever decision is made, whether the process has allowed the views of African Americans and other minorities to be heard and considered.

In short, we believe that the Voting Rights Act is relevant to rules and procedures that shape the decisionmaking process and work to exclude, or marginalize the role of, minority representatives from the *process* by which governmental decisions are made. These are "third generation" claims -- claims by African American and other minority voters for a right to enjoy the same opportunity as other voters to use their vote to participate in governmental decisionmaking.

In the legislative history of §5, Congress explicitly has pointed to changes that it defines as involving "*rules or practices affecting voting*," such as "abolishing or making appointive offices sought by Negro candidates" and "extending the term of office of incumbent white officials," 1970 House Report at 3283, as examples of the kind of structural device this provision is intended to prevent. It repeatedly has recognized that such manipulation of the conditions of office-holding can profoundly affect the value of the votes that blacks are now able to cast. *See, e.g.*, 1975 Senate Report at 17; 1982 House Report at 18; 1982 Senate Report at 7;

Presley, on the other hand, holds that the Voting Rights Act is only concerned with the ability to cast a vote. According to its analysis, the "searching practical evaluation of past and present reality" required by the Act, 1982 S Rep. at 30; *Thornburgh v. Gingles*, 478 U.S. 30, 79 (1986), stops abruptly at the voting booth. However, *Presley*'s analysis ignores the fact that certain procedural changes in government, just like electoral structures, may adversely impact the power of minority voters' votes. Such changes, which dilute or nullify the ability of minority voters, through their representatives, to participate in the governing process, are just as pernicious as registration barriers or unfairly drawn districts.

Congress long has endorsed the principle that the Voting Rights Act inquiry does not end at the voting booth. Rather, as the Court stated in *Allen v. State Board of Elections*, the "right to vote can be affected by a dilution of voting *power* as well as by an absolute prohibition on casting a ballot. 393 U.S. 544, 563-569 (1969) (emphasis added). Each time it has reauthorized §5, Congress has reaffirmed *Allen's* interpretation of the Act's legislative purpose. Yet *Presley* contradicts the principle, expressly stated in *Allen*, that §5 applies not only to procedures governing the casting of ballots, but to any practices that "affect the power of the citizen's vote." *Allen*, 393 U.S. at 569. *See*, *City of Lockhart v. United States*, 460 U.S. 125, 131. ("In moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue. * * * For example, [two of the old seats] now constitute only 40% of the council, rather than 67% of the commission.")

As the Solicitor General argued in his *amicus curiae* brief in *Presley*:

> Some changes in the powers of an elected official plainly affect the power of a citizen's vote and therefore are covered by §5. To take an extreme example, a change eliminating all of a county commission's powers and making that body purely ceremonial would reduce the citizen's vote for county commissioners to a virtual nullity. *Cf. Allen*, 393 U.S. at 569-70 (change making an elective office appointive is covered by §5). Less drastic changes in the authority of an elected body can also affect the power of a citizen's vote. For example, stripping a school board of its power to set the tax rate would diminish the voting power of citizens who vote in school board elections, even if the school board were to retain other significant powers. After the change, a vote for school board members, although not meaningless, would mean less than it did before. And such a diminution in voting power could have a racial purpose or effect and thus have the potential for discrimination.

Understand that the concern with efforts to restructure the governing or decisionmaking process to exclude African Americans or other protected minorities is neither novel or hypothetical. *See, e.g.*, U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*

68-69 (1975). The Commission on Civil Rights reported that as early as 1974, African American citizens of a Louisiana town were forced to obtain an injunction to prevent the departing white city council members from transferring control of the municipal power plant to an all-white commission prior to the seating of the black mayor and new, majority-black city council. *Jackson v. Town of Lake Providence*, Civil No. 74-599 (WD La July 11, 1974). *See, also, Sellers v. Trussell*, 253 F. Supp. 915, 917 (MD Ala 1966) (3-judge court)(holding that an extension of incumbents' terms violated the Fifteenth Amendment because it was designed to "freeze Negroes out").

Changes in the rules that govern the decisionmaking process and other changes that affect minority voters' ability to participate in the governing process should be covered by §§2 and 5 of the Voting Rights Act. Inquiry under these sections would be limited to an assessment of the voting process itself to determine whether a challenged voting practice has a racially discriminatory effect. With a specific focus on decisionmaking rules, the inquiry would focus on process, not outcome. Certainly, as the following examples will show, where changes in usual procedures occur following the election of minority officials, review is warranted.

In *Presley*, the commissioners abolished the system by which individual commissioners elected from a district had complete authority over the road shops in their districts. They replaced this system with one in which the commission as a whole exercised authority over all road shops for the county. This shift from individual decisionmaking by an official elected from a district to group control over all decisions was the functional equivalent of a change from district-based to at-large elections. Just as the votes of a cohesive African American community are submerged and diluted within a bloc-voting white majority in an at-large election scheme, Mr. Presley's vote is submerged within the bloc-voting white majority of the Etowah County Commission.

In an interview on April 24, Mr. Presley observed:

> Road commissioners have a road crew, they have heavy equipment that goes into the outlying areas of the county to maintain the roads. Each of the four "holdover" commissioners has a road crew, with at least 10 employees to do this. Before the change, I would have been responsible for, among other things, paving roads in the rural communities (where most of my white constituents live), but since the change, *I can't even bargain with the other commissioners* because I have no say over the budget. The white majority of the commission will not allocate any of the budget for my road projects. The majority votes as a majority to support their own projects.

Telephone interview with Commissioner Lawrence Presley, 4/24/92 (emphasis added). An at-large voting scheme indisputably would be covered under §§ 2 and 5. The decisional rule change should be covered as well.

Presley is but one example of the ways in which a majority constituted along racial lines can structure the rules of political competition to foreclose equal participation by minority representatives. *Rojas v. Victoria Independent School District*, Civ. Act. No. V-87-16 (S.D. Texas, Mar. 29, 1988) *aff'd.*, 490 U.S. 1001 (1989), is another. In *Rojas*, after Boardmember Gutierrez became the first Latina elected to the county school board, the white majority of the school board voted to change the board's operating procedures to give the board president discretion to require the consent of two members, rather than one, before placing an item on the school board's agenda.

The changed voting procedure enabled the president to deprive the Latina schoolboard member of her right to engage in dialogue, to deliberate with her colleagues, or to attempt to build a coalition on issues of importance to her constituents. The new procedure allowed the white majority arbitrarily to exclude from discussion any issue that whites deemed undesirable. Such exclusion would not be the result of Ms. Gutierrez's minority status on the school board. Rather it would be the result of unfair restructuring of the procedural rules to ensure that she did have the opportunity to even attempt to build support for the causes supported by her constituents.

Shelby County, Tennessee provides another example of this type of claim of dilution of voting power. In the 1980s, the Tennessee legislature passed legislation allowing each of its counties to adopt home rule. The enabling legislation provided, however, that certain kinds of acts, such as decennial redistricting, required a two-thirds majority vote. By 1992, when County redistricting began, 4 of the 10 Shelby county commissioners were African American. The vote on the redistricting plan divided along racial lines. Because of the opposition of black commissioners, the white commissioners were unable to win the required two-thirds majority support to pass their plan. Rather than seek a compromise with the

African American commissioners, the white commissioner attempted to pass the plan by a simple majority.

The Shelby County procedural change is functionally indistinguishable from the white Jaybird primary outlawed in *Terry v. Adams*, 345 U.S. 461 (1953).[15] Like the Jaybirds who restricted the pre-primary contest to participation by whites only, the county commissioners in Shelby County reconstituted themselves as an artificial all-white majority by reducing the number of votes necessary to pass the redistricting measure. They were then able to hold the vote among themselves to the complete exclusion of African American voters or their representatives.

A case that LDF is now investigating in Haywood County, Tennessee, gives another example of how procedural rules can be changed to the point that African Americans and other voters have no electoral influence at all. Rather than face the prospect of fair African American participation on the school board in a 50% African American county, the County Commission abolished popular elections for the school board and arrogated to itself the authority to elect school board members. Simultaneously, it gerrymandered the county commission districts in a successful attempt to ensure that African Americans would be underrepresented on the body that would now elect school board members.

---

[15] Through the Texas Jaybird preprimary selection process, an all-white group chose, in advance of the Democratic Primary, all the Democratic candidates. *Id*. at 463-64. Black voters, were consequently restricted to voting for the candidates of choice of the white community. Although the Supreme Court, in *Smith v. Allwright*, 321 U.S. 649 (1944), had already extended Fifteenth Amendment coverage to Democratic Party primaries, ingenious devices, such as the Jaybird all-white primary, continued to deny blacks the right either to run as candidates or to choose candidates of their choice.

With this pair of changes, the county commission repeatedly shrunk the African American percentage of the electorate that chose the school board until African American voters' ability to influence the election finally was obliterated. First, in converting from popular election by districts to election by the county commission as a whole, the commission eliminated its districting system in favor of an at-large election scheme. Then, to make certain that there would be no African American input into the election of school board members, the commission reconfigured the county commission districts to ensure that whites who comprised 50% of the county's population would elect 100% of the school board members. This scheme is the functional equivalent of the typical racial gerrymander *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)[16]. Even if the white commissioners choose to exercise their complete electoral monopoly in a benign fashion by electing black school board members, it does not change the fact that African American votes are irrelevant to the choice.

Conclusion

As United States Assistant Attorney general John Dunne observed, "the whole spirit of the Voting Rights Act is that a particular group cannot gang up to deprive individual members of a protected minority their right." Pear, under the Voting Law, Citizens' Rights Get More than Lip Service," *New York Times*, July 21, 1991 at E4. We agree and we therefore respectfully urge that Congress amend the Voting Rights Act to clarify in light of *Presley* and *Rojas* that transfers of authority, procedural rules and other voting practices that dilute the votes of the protected class by impairing the power of their elected representatives to participate in the decisionmaking or governing process are covered under §5 and §2.

---

[16] In *Gomillion*, a statute altered the boundaries of the City of Tuskeegee from a square to an "uncouth 28-sided figure" and removed all but a few African Americans from the jurisdiction.

○

ISBN 0-16-040639-0
90000
9 780160 406393